TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, [redacted] 1928

No. [redacted] 15

BOSTON SAND & GRAVEL COMPANY, PETITIONER,

vs.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 24, 1927

CERTIORARI GRANTED NOVEMBER 21, 1927

(33,003)

(33,003)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927

No. 551

BOSTON SAND & GRAVEL COMPANY, PETITIONER,

vs.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

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IN UNITED STATES DISTRICT COURT, DISTRICT OF MASSACHUSETTS

No. 2223. In Admiralty

BOSTON SAND & GRAVEL COMPANY, Libellant,

v.

UNITED STATES OF AMERICA, Respondent

MEMORANDUM AS TO FORMER APPEAL

[Memorandum.—This cause was heretofore appealed by the Boston Sand & Gravel Company, libellant, to the United States Circuit Court of Appeals for the First Circuit, from a final decree entered in this court on the 30th day of July, 1924, and an appeal record was duly certified by the Clerk of the U. S. District Court and entered in said Circuit Court of Appeals at the October Term, 1924, and entitled No. 1826, Boston Sand & Gravel Company, Libellant, Appellant, v. United States of America, Respondent, Appellee, to which record reference is hereby made in lieu of an actual incorporation herein.

James S. Allen, Clerk.]

[fol. 2] IN UNITED STATES DISTRICT COURT

MANDATE, U. S. C. C. A.—Filed September 10, 1925

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable the Judge of the District Court of the United States for the District of Massachusetts, Greeting:

Whereas, lately in the District Court of the United States for the District of Massachusetts, before you, in a cause numbered and entitled, No. 2223, Civil Docket, Boston Sand & Gravel Company, Libellant, vs. The United States of America, Respondent, the following Final Decree was entered July 30, 1924:

FINAL DECREE—July 30, 1924

LOWELL, J.:

This case came on to be heard at the December Term, 1923. It was argued by counsel, and after mature deliberation thereon had, it is ordered, adjudged and decreed that the libel in the said case be dismissed with cost for the respondent taxed at $147.11.

By the Court.

Arthur M. Brown, Deputy Clerk. (Seal.)

[fol. 3] And whereas said Boston Sand & Gravel Company, Libellant, appealed from said Final Decree to this United States Circuit Court of Appeals for the First Circuit, as by the inspection of the transcript of the record in said cause of the said District Court, which was brought into the United States Circuit Court of Appeals for the First Circuit, by virtue of the aforesaid appeal, agreeably to the act of Congress, in such cases made and provided, fully and at large appears,

And whereas, in the term of October, in the year of our Lord one thousand nine hundred and twenty four, the said cause came on to be heard before the said Circuit Court of Appeals, on the said transcript of record, and was argued by counsel;

On consideration whereof, it is now, to wit, July 7, 1925, here ordered, adjudged and decreed as follows: The decree of the District Court is reversed and the case is remanded to that court for further proceedings not inconsistent with the opinion passed down this day, with costs to the appellant.

Costs in this United States Circuit Court of Appeals for the First Circuit, to be satisfied under the direction of said District Court in favor of said Boston Sand & Gravel Company, Libellant, Appellant, and against said United States of America, Respondent, Appellee, are taxed at four hundred and twenty eight dollars and forty five cents ($428.45).

You, therefore, are hereby commanded that such further proceedings be had in said cause, in conformity with the aforesaid decree of this court, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witness, the Honorable W. H. Taft, Chief Justice of the United States, the tenth day of September, in the year of our Lord one thousand nine hundred and twenty-five.

Arthur F. Charron, Clerk of the United States Circuit Court of Appeals for the First Circuit.

[fol. 4] Costs of Appellant:

Clerk	$35 95
Transcript (D. C.)	358 15
C. C. A. Printing Record	13 85
Certificate (D. C.)	50
Attorney	20 00
	$428 45

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 1826

BOSTON SAND AND GRAVEL CO.

v.

UNITED STATES

Bill of Costs

Clerk's fees:	
Docketing case	$5 00
Filing 24 printed copies of record	5 00
Appearances 2 @ 25c; filing 25c	75
Fees on printing	1 75
Calendar	1 00
Assignment 20c; hearing 20c	40
Filing briefs and receipts	5 50
Entering decree $1, filing 25c, recording 20c	1 45
Copy opinion to file $2, filing 25c	2 25
Filing petition for rehearing	25
Order denying rehearing 20c; filing 25c	45
Filing certificate as to costs (D. C.)	25
Filing bill of costs 25c; copy for mandate 20c	45
[fol. 5] Mandate $5, copy to file $1, filing 25c	6 25

Certified copy opinion for mandate	4 00
Minuting issuing of mandate	20
Clerk's fees including mandate	35 95
Transcript and printing (D. C.)	358 15
Printing (C. C. A.)	13 85
Certificate as to costs (D. C.)	50
Attorney Docket fee	20 00
	$428 45

In United States District Court

Opinion of the U. S. Circuit Court of Appeals Accompanying Mandate—July 7, 1925

Before Bingham, Johnson, and Anderson, JJ.

Bingham, J.:

This is an appeal from a decree of the federal District Court for Massachusetts in an admiralty proceeding brought by the Boston Sand & Gravel Company, the owner of the steamer Cornelia, against the United States, under a special Act of Congress approved May 5, 1922, to recover damages sustained by the Cornelia in collision with the destroyer Bell in the dredged channel of Broad Sound at the entrance to Boston Harbor, August 9, 1918.

The court below entered a decree dismissing the bill and the libellant appealed.

The Cornelia was a steam sand lighter, 130 feet long and 30.5 feet beam. At the time of the collision she was proceeding light from Boston to Scituate, at about 4½ knots, to obtain a cargo of sand and gravel. There was a thick [fol. 6] fog restricting one's view to from 50 to 75 yards. The Bell was 314 feet long and 31 feet in width. Her bridge was 225 feet from her stern and she was painted in camouflage colors.

On the morning in question both vessels were proceeding out of the harbor intending to go through the north channel. At that time, for war purposes, a steel submarine net, about 500 feet long, having a gate 100 feet wide, had been

stretched across this channel. The gate swung on buoys at the left side of the channel as one passed out to sea. In the day time it was kept open, being moored at right angles to the net. The net and gate were submerged, but their location was marked by buoys. A vessel desiring to go out of the harbor was required to receive permission from a station ship anchored off Deer Island Light, about a mile from the net.

As the vessels approached Deer Island Light the Bell passed the Cornelia on her starboard side some 150 feet distant and obtained permission to go through the net a few minutes before the Cornelia did. When the Bell passed the Cornelia the fog had lifted somewhat and each knew and appreciated that the other was outward bound through the net, and the Bell was aware that the Cornelia was proceeding at a slightly slower speed than she was. When the Bell came within sight of the net the gate appeared to be closed and her officers caused her engines to be reversed. The Bell stopped and remained so for two minutes when her lookout on the bridge sighted the Cornelia. About three minutes elapsed from the time the net was sighted until the Cornelia was seen. She was first seen on the port quarter of the Bell by the lookout on the port wing of the Bell's bridge, who was stationed about 215 feet from her stern. Immediately on observing the Cornelia the Bell signalled for standard speed ahead. Two men were stationed on the Bell's fan tail, about 20 to 30 feet from her stern. It was undisputed that the duties of these men were to attend to the depth charge and to look out for sub- [fol. 7] marines. There was a dispute, however, whether they were to observe and report vessels generally. They made no such reports that morning on the way out. Both vessels claim to have given the proper fog signals, though neither heard the other. On the stern of the Bell was a depth charge sponson extending out under the water some 15 or 20 feet.

When the Cornelia sighted the Bell they were from 75 to 120 feet apart. She then ported and turned her bow to starboard and in doing so struck the depth charge sponson, which cut her open and made it necessary to beach her. The sponson of the Bell was broken and she received other damage.

The District Court found that the Bell was at rest at the time of the accident and was free from fault; that the Cornelia was at fault, apparently because she failed to so regulate her speed in the fog that she could stop after first seeing the Bell.

We think that the District Court erred in finding that the Bell was free from fault. There can be no question that the Bell knew the Cornelia was following her out through the net only a short distance behind; that she knew the passage was a narrow one; and that in stopping in the fog as she approached the gateway she was creating a dangerous situation which called for special care and caution, particularly with reference to the Cornelia. Being aware of these facts she failed to station anyone at her stern to observe and report the approach of the Cornelia or to instruct the men on the fan tail (the depth bomb men) to observe and report the approach of the Cornelia. The evidence further showed that had the Bell been ten feet in advance of the position she was in at the time the Cornelia crossed her stern no accident would have occurred.

It is therefore evident that time was of the essence, and had the approach of the Cornelia been reported to the Bell but a short time earlier the accident would not have oc- [fol. 8] curred. All the witnesses for the libellant testified that had the Bell stationed a lookout at her stern the Cornelia's approach would have been sooner observed; and two of the officers of the Bell testified that with a lookout the approach of the Cornelia would undoubtedly have been seen sooner than she was by the lookout on the bridge. We think the Bell was guilty of contributory fault. The damages to the vessels should be divided.

The decree of the District Court is reversed and the case is remanded to that court for further proceedings not inconsistent with this opinion, with costs to the appellant.

A true copy.

Attest:

Arthur F. Charron, Clerk. (Seal.)

In United States District Court

Interlocutory Decree on Mandate—November 10, 1925

Brewster, J.:

A mandate having been received from the Circuit Court of Appeals in said cause and entered, reversing the final decree in this court entered on July 30, 1924, with costs in the Circuit Court of Appeals to the appellant, and this case having been heard on the pleadings and proofs and having been argued and submitted by the proctors for the respective parties, and the court on consideration thereof [fol. 9] having found as stated in its opinion dated July 7, 1925, that damages of the libellant, Boston Sand & Gravel Company, were caused by the fault of both the libellant and the respondent, it is therefore

Ordered, Adjudged and Decreed

that the libellant recover from the claimant one-half its damages and one-half its costs together with full costs in the Circuit Court of Appeals, and that said cause may be referred to Fitz Henry Smith, Jr., Esq., as commissioner to determine the amount of said damages and report thereon to this court with all convenient speed.

By the Court, Frank H. Mason, Deputy Clerk.

In United States District Court

Report of Commissioner

Filed September 20, 1926

By Interlocutory Decree on Mandate, dated Nov. 10, 1925, it was ordered that the libellant recover from the claimant one-half its damages and one-half its costs, together with full costs in the Circuit Court of Appeals, and that the cause be referred to me as Commissioner to determine the amount of said damages and report thereon to the Court.

[fol. 10] Statement of the Case

The libel was for damages alleged to have been sustained by the libellant as owner of the steam lighter "Cornelia" from a collision of the lighter with the United States destroyer "Bell" in Broad Sound Channel, Boston Harbor, Aug. 9, 1918. It was brought by virtue of an Act of Congress approved May 15, 1922, which provided that the claim of the owner might be submitted to the United States District Court for the District of Massachusetts "under and in compliance with the rules of said Court sitting as a Court of Admiralty and that said Court shall have jurisdiction to hear and determine the whole controversy and to enter a judgment or decree for the amount of the legal damages sustained by reason of said collision, if any shall be found to be due either for or against the United States, upon the same principle and measure of liability with costs in like cases in admiralty between private parties with the same rights of appeal."

Pursuant to the order appointing me, I met the parties, heard their evidence, examined their exhibits and vouchers, and listened to the arguments of counsel, and now, after careful consideration, report to the Court.

The port bow of the "Cornelia" struck the starboard quarter of the "Bell," injuring the lighter so as to cause her to leak badly, and she was thereupon beached and subsequently disposed of as hereinafter related.

I find that the libellant, Boston Sand & Gravel Co., is a corporation engaged in the business of producing and selling sand and gravel in Boston and vicinity, having property and a plant at Scituate, Mass., where the material is obtained and transported therefrom by water, about 75 per cent of the shipments being to Boston and the balance to places on the north shore beyond Marblehead. For the means of transporting the material the Company had, in [fol. 11] 1918, a fleet of six steam lighters, so called, one of which was the "Cornelia."

The "Cornelia" was a vessel of 285 gross and 163 net tons, 128 feet long, 30.9 beam, and 9.1 deep, with a total cargo capacity of 450 tons. She was built of wood, at Noank, Conn., in 1908, and was of heavy construction. She had twin screws, and her propelling machinery consisted

of two fore and aft compound condensing engines, the cylinders being 11 inches and 26 inches, the stroke 1 foot, 6 inches, and the estimated horse power 400. She had circulating and other auxiliary pumps and two main boilers 9 feet, 6 inches long by 72 inches in diameter, marine type, built at Oswego, N. Y. in 1906, and was allowed a steam pressure of 125 pounds. And she had one furnace for each boiler, 6 feet, 6 inches by 5 feet, with an aggregate surface of about 33 square feet.

The lighter was purchased by the libellant July 14, 1915, for $17,500.35, and was immediately altered to fit her for the uses of the Company. The alterations included the installation of steam steering gear, a Ledgerwood hoisting engine with 4 drums, a 65 foot mast with a 60 foot boom and gear for a 2 ton clam shell bucket, and the construction of two open wells holding 190 tons of cargo, and a cabin with a galley for a crew of 10 men.

The total cost of the alterations was $8,230.30, and the vessel was carried on the books of the Company at $25,000, the round figures of her cost to the Company. She was insured with the Boston Insurance Company Mar. 18, 1916 for $30,000.

As altered, the appearance of the "Cornelia" was that of a large tow boat, but with engine, stack and superstructure aft, and a large mast and boom in the bow for the handling of the cargo which was carried amidships. When loaded she was low in the water. Both vessels were bound out at the time of the collision, and the "Cornelia" was then light.

[fol. 12] The collision took place about 8 o'clock on the morning of Aug. 9, 1918, and the lighter was beached on Fawn Bar outside of Deer Island, where the tide overflowed her. She lay about northeast, southwest, with her stern to the southwest.

Attempts to Raise the "Cornelia"

The libellant was notified of the accident and a tug was engaged, and Mr. Maxwell, the President of the Company, since deceased, Mr. Bird, a consulting engineer then in the employ of the Company and later its President, and Charles

E. Rowe, the marine superintendent of the Company in charge of the upkeep of its fleet, went down to the "Cornelia." Mr. Rowe thought that she could be floated easily, and they returned to Boston. Rowe engaged Betts Bros. to put a patch on the bow of the lighter, where she was stove in by the collision, hired an 8-inch pump from the T. A. Scott Co. and went back to the stranded vessel in the lighter "Reliance" belonging to the libellant, and reached the scene of the wreck the evening of Aug. 9 at about low water. The main deck of the vessel was then some 2 or 3 inches out of water, and she was so constructed that at both ends the decks were about 2 feet higher than the main deck. The hatch combings amidships were built up about 3 feet above the main deck.

Rowe ran the "Reliance" alongside the lighter and put a hose down the forward companionway, explaining that he did this in order to reach the water in the bottom inasmuch as the wells were practically watertight and if placed there the hose would only have exhausted the water that was in the well. He started the pump and after running it some two hours succeeded in lowering the surface perhaps two inches, and it was found that the water was coming through the top sides of the vessel, which, ordinarily out of water, [fol. 13] were submerged as she lay aground and leaking from the pressure of the sea against them.

Rowe accordingly stopped the work but still thought that the lighter could be saved, and he returned the next morning, Aug. 10th, intending to try again to pump her out. He found on arriving that the wind had turned east and that a sea was running, which, with the vessel held down at the stern by the weight of her engines, caused the forward end to move up and down 20 inches or more. Parts of the after house were washing away, and it seemed to him that the vessel was pulling apart amidships, and as the bottom was covered with boulders he came to the conclusion that she would be damaged more than she would be worth to repair. So he gave up the attempt to save her and returned to Boston and advised Mr. Maxwell that it was not a good business proposition to undertake to raise the vessel.

Meanwhile, a special agent of the Boston Insurance Co., Mr. Veazie, working under Mr. Henry R. Hedge, the Vice President of the Company and in charge of marine losses,

had conferred with the officers of the libellant. He was advised of the results of Rowe's attempt to pump the lighter and of the situation of the vessel, and engaged a diver to make an examination of the hull. Veazie went down the harbor with the diver, who made him a verbal report and also submitted a written report to the Insurance Company. The diver did not testify, as he was absent from the district and could not be located, but his report was admitted in evidence as what he stated to the Insurance Company and upon which the Company acted.

[fol. 14] The diver's report was dated Aug. 16, and read as follows:—(Libellant's Exhibit 4)

"On August 12, 1918, I made an examination of the S. S. Cornelia ashore at Deer Island, Boston, Mass. and found conditions to be as follows: I found two holes on the Port side forward of the rigging one above the other. The top hole measures about five feet long and about a foot across, and the other a few feet below this hole is about two planks wide and four frames long. The bottom of the bay at this point is full of boulders of various sizes all the way from the size of a water pail up to one on the Port side midship about eight foot on the base and about six or seven feet high. The vessel is buried up to the ice sheathing in gravel, boulders and sand forward and aft the same up to about the bottom of the propellers. The vessel being buried this way I was unable to get at the bottom to find out to what extent it was damaged, but on going into the after well I found that there was at least three feet of sand and gravel that probably came through the bottom as the material that I brought up as samples is said to be an altogether different kind from that carried by the vessel on August 13 and went into the forward well and found the well was broken on the bottom on the side or end and could feel a current coming through (tide was flooding at the time) the rest of the well outside of this corner was filled with gravel and sand to a point about the Keelson. The vessel now lays on an even keel with about two feet of water over the decks at low tide."

The bottom of the lighter was flat with about 3 inches dead rise and hard bilges.

Veazie also talked with the T. A. Scott Co. and with [fol. 15] Betts about their undertaking to raise the vessel,

but the Scott Co. would not tackle the job on any basis, and Betts did not make any proposition.

I find that the reports of the diver had great weight with the Insurance Company in determining the position which the Company should take—in particular, the statement made both orally and in his written report that there seemed to be a current moving through the vessel and that he found sand in her which was not of the kind that she had been carrying. Veazie conferred with Hedge, who had the ultimate say as to what the Insurance Company would do, and Hedge determined to recognize the vessel as a total loss, and under date of Aug. 13 wrote the libellant as follows: (U. S. Exhibit F).

"Cornelia"

"In view of the condition of this vessel and the difficulties in raising her, we are satisfied that the cost of raising and repairing this boat would exceed the valuation of $30,000.

"Under the circumstances, we are prepared—(1)—to pay you the sum insured, $30,000, taking an assignment of interest in the wreck; or (2) we will pay you the sum of $25,000 in full settlement and release of all claims under the policy, said policy to be surrendered, you to retain ownership in the wreck."

Thereafter, and before the libellant replied to the letter, the Insurance Company employed three surveyors to make a further examination. These surveyors, Oscar G. Eaton, William B. Price and Robert H. Fraser, went aboard the vessel Aug. 20th and then made the following report to the Insurance Company: (U. S. Exhibit G).

(fol. 16) "We, the undersigned, this day examined the Boston Sand & Gravel Lighter Cornelia, ashore at Fawn Bar. This lighter was full of water. The decks were awash at low water. On examination of the hull it showed strain and work around the foremast and at the bulkhead.

"From the situation in which we found her, it is our opinion that the cost of raising and repairing this lighter would be in excess of thirty thousand dollars ($30,000).

There was a suggestion by the libellant that it be allowed $2,500 for and retain the lighter, but nothing came of the

suggestion, and on or about Aug. 20 the officials of the libellant met and discussed the matter and after a conference with the Insurance Company wrote the Insurance Company on the 23rd accepting $30,000 for the loss of the vessel (Libellant's Exhibit 16).

Under date of Aug. 26 an agreement was entered into between the parties, reciting the abandonment of the lighter to the Insurance Company, the acceptance of $30,000 by the assured in full satisfaction of the amount insured by the policy, and assigning all interest in the vessel to the Insurance Company with power to sue and recover in the name of the assured for the damages it had sustained. The agreement also contained an undertaking by the Insurance Company that if it secured "by any means or from any source more than the sum of $30,000, together with interest from date and all costs and expenses, including counsel fees", it would turn over such excess to the assured (U. S. Exhibit E).

About this time, Mr. John I. Snow, of Rockland, Maine, called at the Insurance Company and saw Mr. Veazie. Snow was connected with the I. I. Snow Co., which had a ship repair yard in Rockland, and he personally owned a wrecking outfit, including a tug and steam lighter, some barges, and pumps of various sizes. Veazie told him of the different [fol. 17] wrecks they had and mentioned the "Cornelia". Snow said that he might be interested, and he went down the harbor to see the vessel. He found that the tide was too high for an examination and made another trip the following morning, which he thought was a Wednesday or Thursday and the 27th of August. If material, it appears that the 27th of August was Tuesday.

The tide was low on the second occasion and he went aboard the lighter, walked around the deck, looked her over, and, there being about 10 feet of water where she lay, took a long boat hook and went around the hull and examined the bottom with it. He found that the bottom was composed of coarse gravel intermixed with cobble stones varying in size from stones as big as a man's fist to boulders of perhaps 10 tons. The vessel lay against a big boulder on the port side amidships that was about 7 feet high, and she had been chafing against it.

Whether there were any holes in the hull Snow could not see, but he determined in his own mind what he could get from the vessel in case she could not be pumped, and what he could give for her, feeling that if he could get her whole it would be the cheapest, but if not, he would strip her, which would be more expensive. He said he had to work fast, and he returned to Veazie and offered $5,000 for the vessel, which was accepted, and she was sold to him that day.

Snow then went to Rockland, got his equipment ready and brought it to Boston with his tug and lighter, and Saturday afternoon made fast to the stranded vessel and set up one 8 inch pump. Sunday morning he got a 12 inch and another 8 inch pump set up and all three ready to work. On Monday, which was Labor Day, he obtained a diver and had the vessel patched, and when the patch was completed started the pumps and floated the vessel, and towed her in and beached her on the inside of Deer Island at about dark that night.

[fol. 18] Early the next morning he had a new patch put on, as the vessel lay on the flats at low water, in place of the one made by the diver, and then towed her to Green's ship yard in Boston, where she was later hauled out.

No hole was discovered in the hull other than that caused by the collision, but the keel was gouged and chafed its whole length, and the bottom was so chafed that in some places the planks which were originally 3 inches were only an inch thick, and in one place were reduced to half an inch. The deck was started around the break forward and aft, the house was gutted on the main deck level, and the fittings of the galley were all down. The port propeller shaft was bent about 6 inches and the strut broken, and some of the blades of both propellers were broken at the tips.

The lighter remained at Green's about a week, during which time the hold was cleared of the mess it was in from the submersion, the engines and boilers were cleaned, and the chafed and torn threads cut from the keel and planking, and the butts caulked where they showed signs of leaking. When this was done, she was towed to Rockland, Snow's tug being ahead and his lighter astern, one boiler and the starboard engine of the injured vessel being worked

all that they could be worked, to help on the way down. She leaked on the trip about an inch an hour.

At Rockland the vessel was put on a railway and repaired. She left the railway about Nov. 20, and her boilers were gone over and made tight. The boilers required further attention thereafter, though nothing more serious than welding, but it was two months or more before they were in shape.

Snow figured that it cost him $22,000 to raise and repair the vessel, in addition to the purchase price, but not including insurance or similar charges. (U. S. Exhibit 1) He chartered her for a while to carry sand from the Merrimac [fol. 19] River to Boston, in which work she was engaged for 6 or 7 months, and in December, 1920, sold her for $60,000, out of which he paid a commission of $10,000.

Contention of the United States

It was strenuously argued by counsel for the government that a reasonable effort to raise the "Cornelia" was not made before she was sold, and that she was not worth what it is now claimed that she was worth. And he further contended that all that the libellant was entitled to recover was for the fair cost of salvage and repairs.

It is not to be questioned that a damaged vessel owner must do all that he reasonably can do to minimize the damages. The law upon the subject has been stated at length by the Supreme Court of the United States in the case of

The Baltimore, 8 Wall. 377

That was a case where a schooner was sunk in the channel of a river and the owner was allowed to recover the value of the vessel. The decree was reversed, and, after stating the rule in damage cases to be restitutio in integrum where repairs are practical, and, in case of total loss, the market value of the vessel, if she is of such a class as to have a market value, the Court said, in an opinion by Mr. Justice Clifford: pp. 386 ff,

"Evidence, however, that the injured vessel is sunk is not of itself sufficient to show that the loss was total, nor is it sufficient to justify the master and owner in abandoning the vessel or the cargo unless it appears that the

circumstances were such that the vessel could not be raised and saved or that the cost of raising and repairing her would exceed or equal her value after the repairs were made.

[fol. 20] "Experience shows that in many cases where the injured vessel is sunk especially when the disaster happens in rivers or harbors, the vessel may be raised at moderate expense, and that the cargo, if not perishable, may be saved and restored to the shipper, or carried forward to the port of destination; and the rule in such cases is to award such damages only as will compensate the owners for the loss incurred, which is held to include the expense of raising the vessel and putting her in repair, with a proper allowance for the loss of freight and for the damage to the cargo, and for the detention of the vessel during the time necessary to make the repairs and fit the vessel to resume her voyage.

"Justice as well as sound policy forbids that the owner of a vessel sunk by collision should be allowed to recover the full value of the vessel and cargo except in cases where the entire property is lost by the disaster, which is not true in a case where, by reasonable exertions the vessel may be raised and the cargo saved by the use of such nautical skill as the owners of vessels usually employ in such emergencies. Owners of vessels seeking redress in such cases must be prepared to show, not only that those in charge of the other vessel were in fault, but that no negligence on their part has increased or aggravated the injury. Damages are awarded in such cases for the injury done to the vessel and cargo by a wrongful act, but if the party suffering the injury to his property will not employ any reasonable measures to stop the progress of the damage, but willfully and obstinately, or through gross negligence, suffers the damage to augment, it is his own folly, and the law will not afford him any redress for such part of the damage as proceeded directly from his own culpable default.

[fol. 21] "Persons injured in their property by collision are entitled to full indemnity for their loss, but the respondents are not liable for such damages as might have been reasonably avoided by the exercise of ordinary skill and diligence, after the collision, on the part of those in charge of the injured ship.

"Responsive to these views, the suggestion is, that the libel alleges that the schooner and cargo were sunk in such deep water as to make both a total loss, but the insuperable difficulty in the way of that suggestion is, that the allegation of the libel is expressly denied in the answer, and the libelants failed to introduce any proof to support their allegation. Subsequent to the disaster, several witnesses saw the schooner, and they concur that her masts were some eighteen feet out of water, and that she lay with her stem to the west-northwest, in the exact course in which she was steering when she was sunk by the steamer. Theory of the libellants is, that the vessel and cargo were of no value, but the court cannot adopt that theory in the absence of any proof to warrant the conclusion.

"Decided cases may be found where it is held that the owner of the injured vessel is not bound to raise the vessel in a case where she was sunk by a collision; but it is clear that the court cannot award damages for a total loss, where it appears probable that the vessel and cargo may be raised without much expense, and restored to their owners.

Under the paragraph last quoted the Court cited

The Columbus, 3 W. Rob. 159.

That case dealt with a fishing smack sunk by a collision, where, before proceedings were begun, the owners of the [fol. 22] offending vessel, the Columbus, raised the smack and brought her into port and offered to deliver her to her owners, who paid no attention to the offer. The Columbus was libelled and held solely at fault by the Court, and the Registrar, to whom the case was referred, awarded damages for an entire loss of the smack. It was contended that this was error under the peculiar circumstances of the case, and that the offending owners should only be held liable for the cost of such repairs as might be necessary to put the injured vessel in such condition as she was before the collision.

Dr. Lushington confirmed the report of the Registrar, but confessed that there was difficulty in the case and said, p. 166:

"The rule which I consider it incumbent upon this court to follow, in cases of this description, is this, that if a

vessel is not merely run into and partially damaged, but is actually sunk at sea, it is not incumbent upon the owner of that vessel to go to any expense whatever for the purpose of raising her. I apprehend this to be the true principle; but let me not be misunderstood, that this principle would apply in any case where the vessel is not actually sunk, but is only partially damaged. In the latter case, where there is the slightest chance of bringing the damaged vessel safely into port, the principle, undoubtedly, would not apply."

Referring thereto, the author of Roscoe on Damages says, (2nd Ed., p. 53): "This decision, however, is obviously subject to some qualification, because if an owner can properly decide that his ship is a constructive total loss without raising her it would be certainly imprudent and unreasonable for him to incur this expense." He states further that "to determine whether in a collision action a vessel should be considered as a constructive total loss, all questions of in- [fol. 23] surance and of the respective rights of underwriters and assured must be eliminated, and the prudent uninsured owner only called into requisition;" but he admits that, "this is somewhat difficult in practice, because in nearly every case the facts are complicated by the relationship of assurers and assured." And the complication exists in the case at bar.

The owner must decide, however, whether under all the circumstances the vessel is worth repairing, which involves the consideration, not only of her value and the cost of raising and repairing her, but the length of time it will take to restore her to the condition she was in at the time of the collision. "For as the owner of the injured vessel is bound to minimize his loss, it would be unfair that the wrongdoer should have to pay a substantial sum as damages for detention, if without such payment the plaintiff would be indemnified by recovering the value of his vessel." Roscoe, supra, p. 54.

See the Reno, 134 Fed. 559.

There, the owner of the sunken vessel had her raised and repaired without any survey or apparently any preliminary investigation to ascertain whether she was worth raising and repairing, or what it would cost to remove or repair her.

The expense amounted to more than the value of the vessel, and the Circuit Court of Appeals for the 2nd Circuit held that an award exceeding her value at the time of the loss should not be allowed.

Cf. the Venus, 17 Fed. 935, Addison Brown, J.

where the owner was advised to abandon the vessel as a total loss.

[fol. 24] Finding on Attempts to Raise Vessel

I cannot find that the libellant was negligent or that a reasonable effort to save the "Cornelia" was not made. The action of the owner, it seems to me, must be viewed in the light of the circumstances as presented at the time. That the lighter was in an exposed place on a dangerous bottom and likely to go to pieces in an easterly storm was not controverted. And the collision took place when the country was at war and the conditions unusually, both as to facilities for and the costs of raising and repairing a sunken vessel.

The libellant acted in the premises with promptness, at first through Charles Rowe, and afterwards with the Insurance Company, and there was no evidence of collusion or bad faith. Rowe was libellant's marine superintendent. He had built vessels and had some experience in raising them previously to his connection with the libellant, and the officers of the Company relied upon his experience and judgment. He moved as fast as he could in his attempt to raise the lighter, and explained very clearly his reason for first believing that she could be saved, saying that when he first went down to the vessel the weather was good and he thought it would not change and that they could pump her that night, that she had only laid there during the day and there was no sea that hurt her, she was not moving at all, and it looked as if she could be gotten off easily if they could stop the hole made by the collision. He was subjected to some criticism by counsel for the government because he did not investigate to see if the vessel had been patched before he undertook to pump her out. But he said he was told by Betts that the patch had been put on, and as Betts charged for labor that day (Libellant's Exhibit 10) and the patch was all that he had been asked to attend

to—and as Snow found a patch, I have no doubt that it was made.

[fol. 25] Rowe did not arrive at the opinion that the lighter could not be saved until the next morning when he saw the sea that was running and the movement of the vessel on the bottom. He said that he did not know anything about the insurance and that the insurance was not mentioned when he told the president of the Company that it was not a good business proposition to undertake to save the vessel. He did nothing thereafter with respect to the vessel and what was done was done by the Insurance Company, but the owner conferred with the Insurance Company throughout and Mr. Veazie helped Rowe to obtain the pump that he used.

Counsel for the government criticized Veazie's testimony and he was uncertain as to some of his dates. I think he was mistaken in saying that he met Charles Rowe at the scene of the wreck, as he was obviously mistaken that the Insurance Company relied on the surveyors' report in offering to pay for a total loss of the vessel, since the offer was made on August 13th and the survey not until the 20th. But I was impressed with his evident honesty and the substantial truthfulness of his evidence, and have relied upon it.

The Insurance Company had the lighter examined by a diver and endeavored to have her raised but without success. Libellant's officers were advised of the diver's report and of the failure to get the T. A. Scott Co. or Betts Bros. to undertake salvage operations, and they knew also of the report of the surveyors and had all of this information before them when they decided to accept the offer of the Insurance Company to pay for a total loss. The offer was made by the insurers August 13th, but it was not until the 24th that it was accepted by the owner. And whereas the owner finally abandoned the vessel to the Insurance Company, after considering all the reports, it is to be noted that the agreement (U. S. Exhibit E) bound the Company to pay over any ex- [fol. 26] cess obtained above the amount covered by the policy—indicating that the owner did not then regard the insurance as compensation for the loss of the vessel.

The only wrecking concerns to which the parties could turn in Boston were the Scott Company and Betts Bros., the

former being one of the largest in the business on the Atlantic coast. The surveyors were men of standing and long experience in their profession. While Capt. Eaton was regularly in the employ of the Insurance Company, all three were engaged by the Company on this occasion to make a survey of and report on the vessel. They were not otherwise instructed, and I find that the survey was desired by the Insurance Company that it might have expert advice as to what ought to be done with the vessel and because also it was reinsured for the loss.

The surveyors went aboard with Veazie and examined the lighter at low tide and gave him their unanimous opinion that she was not worth raising and repairing, and later made the written report to the Insurance Company quoted above. Fraser, like the diver, could not be reached, but Captains Eaton and Price testified before me and both said they thought that there were holes in the vessel's bottom.

The Insurance Company, having taken the vessel and paid the insurance, determined to sell her for the $5,000 offered by Mr. Snow, which Mr. Hedge said seemed "like manna from Heaven." Snow testified that his offer was based on the strippings and what he thought he could give for the vessel and take a chance, for, he said, it was inevitable that with a heavy sea the hull would go to pieces against the big boulder. The chance of raising her he regarded as a "fifty fifty" proposition. Mr. Burke, of the Scott Company, who saw the lighter within a week after she was beached, described the likelihood that she could be saved as an "outside chance in which you would have to [fol. 27] have all the elements playing into your hands." And Capt. Price testified that, in his opinion there was one chance in a thousand of raising the vessel and Snow got it.

It appears that if Rowe had gone down to the "Cornelia" with equipment such as Snow employed he could have saved the vessel; but I do not think it can be said that the libellant is to be charged with inattention or negligence under the circumstances, or that the fact that the weather continued fair and the lighter was successfully raised by Snow, with apparent ease, prevents the libellant from recovering for the value of the vessel. Snow knew of Rowe's attempt and its result, and, in fact, his operations did not progress without a hitch, for when he had the vessel partially pumped

the swell from a passing destroyer caused her to jump around so that he had to let her sink and to renew his undertaking to get her up.

I determine, accordingly, that the libellant is entitled to recover for the value of the "Cornelia" at the time of the collision, which brings us to the question of her value at that time.

The Value of the "Cornelia"

As has been stated, the measure of damages for a total loss is the market value of the vessel.

The Baltimore, supra.

Roscoe on Damages, supra, p. 33, quoting the old saying that "the worth of a thing is the price it will fetch."

[fol. 28] A good statement of what is meant by "market value" is that of the Court in

"McCloskey v. The Achilles, 15 Fed. Case, 1277, 1278, Case No. 8701.

"The true question is what a prudent owner wishing but not compelled to sell would reasonably expect to get, and would probably be able to get within a reasonable time, at public auction or private sale, without forcing the sale and using proper measures to avoid undue sacrifice."

Cf. 26 Cyc, 819.

In The Colorado, Brown's Adm. Rpts., 411, 413, Judge Longyear said, after reference to the English cases:

"The best evidence of such value is the opinion of competent persons who knew the vessel shortly before she was lost, and the next best evidence is the opinion of persons conversant with shipping and the transfer of vessels."

But this does not preclude other evidence.

See Leonard v. Whitwell, 19 Fed. 547, 549, where Judge Addison Brown said:

"While it is undoubtedly true that the best single class of evidence of market value is the opinions of competent persons who knew the vessel and who knew the state of the market at the time of the loss, it does not follow in any

given case, because witnesses testify to certain facts, that either the commissioner or the court is shut up to their evidence without giving any heed to other kinds of evidence which may be offered."

[fol. 29] And when, on account of conditions or the character of the vessel, there is no market for her, it is said that the cost of reproduction less depreciation may be resorted to.

The Colorado, supra.
The Cushing, 292 Fed. 560, 567, C. C. A., 2nd Ct.
Roscoe, supra, and cases cited.

The last word on the subject is in the review by the Supreme Court of the case of The Cushing, supra, under the title:

Standard Oil v. Southern Pacific Co., 268 U. S. 146.

There, the Court said in an opinion by Mr. Justice Butler, at p. 155:

"It is fundamental in the law of damages that the injured party is entitled to compensation for the loss sustained. Where property is destroyed by wrongful act, the owner is entitled to its money equivalent, and thereby to be put in as good position pecuniarily as if his property had not been destroyed. In case of total loss of a vessel, the measure of damages is its market value, if it has a market value, at the time of destruction.

"Where there is no market value such as is established by contemporaneous sales of like property in the way of ordinary business, as in the case of merchandise bought and sold in the market, other evidence is resorted to. The value of the vessel lost properly may be taken to be the sum which, considering all the circumstances, probably could have been obtained for her on the date of the collision; that is, the sum [fol. 30] that in all probability would result from fair negotiations between an owner willing to sell and a purchaser desiring to buy.

"And by numerous decisions of this court, it is firmly established that the cost of reproduction as of the date of valuation constitutes evidence properly to be considered in the ascertainment of value.

"This same rule is applied in England.

"It is to be borne in mind that value is the thing to be found, and that neither cost of reproduction new, nor that less depreciation, is the measure or sole guide. The ascertainment of value is not controlled by artificial rules. It is not a matter of formulas, but there must be a reasonable judgment having its basis in a proper consideration of all relevant facts."

The sum total of the authorities seems to be that—at least under the peculiar conditions existing during the late war—all the facts and circumstances may be taken into consideration in determining value.

Cf. as to a case at law,

Woonsocket, etc. Co. v. N. Y., N. H. & H. R. R. Co., 239 Mass., 211, 214.

The war brought about an extraordinary increase in the value of American vessels, due to the great demand for tonnage and to the fact that after the United States entered the war the government exercised control over the shipyards of the country, and it was very difficult and at times impossible for owners to replace a vessel taken or sold, with the result that they were very loath to sell what they had and would not do so except for prices which were not heard of in [fol. 31] normal times.

But, as was said by the Court of Appeals in The Cushing, supra, p. 367, the prices "were brought about by unusual economic conditions," while it was not expected that they would survive indefinitely after the war "there was nothing artificial or fictitious about these prices." And they must be taken into consideration in determining the value of a vessel during the period. In fact, the prices rose and were maintained at a high level until 1920, in the latter part of which year they began to decline, and in 1921 fell rapidly.

Although the "Cornelia" was adapted to a particular use, she was a lighter of a type which could be utilized for various purposes. Further, lighters were scarce in 1918, and I find that there was a market for her at the time of the collision. Indeed, the Navy department undertook to requisition the vessel in June, 1918, at which time she was engaged on construction work of the government in Boston, but the libellant persuaded the authorities to take a smaller and slower vessel which it owned.

Inasmuch as I find that there was a market for the lighter, I rule that the cost price of the vessel, the figure at which she was carried on the books of the libellant, and the amount for which she was insured are not material or controlling as to her value. And the liability of the United States to respond in damages is not affected by the fact that the Insurance Company paid the amount of the insurance and has been subrogated to the rights of the assured.

L. Boyer's Sons Co. v. U. S. A., 195 Fed. 490, C. C. A. 2nd Ct.

The Ceylon Maru, 1925, A. M. C., 1605, 1608.

The question of the value of the vessel was tried at length and with great thoroughness by both sides, and there were numerous witnesses. Their evidence of value ran in [fol. 32] round figures from $40,000 to $110,000. Reproduction figures were given by some of the witnesses, and the testimony of all may be summarized as follows:

Witness	Value time of collision	Reproduction
Paul P. Bird	$90,000.	$150,000.
Sanuie Rowe	90,000. to $100,000.	150,000. to 155,000.
Wm. B. Price	90,000. to 95,000.	
Wm. F. Munroe	95,000.	
Arthur P. Friend	100,000.	
Philip H. Doyen	100,000.	200,000.
John I. Snow	100,000.	200,000.
B. Stewart Murphy	105,875.	137,500.
Wm. S. Nolan	40,000. to 50,000.	
Geo. C. Manning	40,279.80	93,673.60
John E. Lord	45,000.	102,000.

Mr. Murphy on further consideration raised his reproduction figure to $141,961, making his estimate of value approximately $110,000. And Lieut. Lord raised the reproduction figure stated by Lieut. Commander Manning to $102,000 because of items omitted by the Commander, from which the latter did not dissent. The last three of the witnesses in the list were called by the government, and the others by the libellant.

Mr. Bird was president of the libellant at the time of his testimony, and at the time of the collision was employed as an expert on the efficiency of the entire plant of the company. He testified that he stated in an affidavit, shortly after the collision, that the "Cornelia" was worth $90,000., so this figure may be taken as a contemporaneous expression of opinion in behalf of the owner of what was then her value.

Mr. Rowe was treasurer of the libellant at the time of his testimony and office superintendant at the time of the col- [fol. 33] lision. He testified that he based his estimate of the value of the lighter on the work she was doing and the demand for vessels. Asked by counsel for the government how he arrived at his figures, he later presented a statement which was introduced as libellant's Exhibit 22, as follows:

"Basis of the opinion of Mr. Sanie Rowe that the fair market value of the Cornelia on August 9, 1918, was $90,000 to $100,000.

"1. The fact that the government paid $50,000 for the lighter Hercules, which in witness's opinion would have brought about half as much as the Cornelia in the market.

"2. The fact that it would cost to construct the Cornelia at this time about $150,000 and shipyards were filled with work.

"3. The fact that it cost to construct the lighter Ajax at Portland, Maine, in the period about August 9, 1918 by using misfits from Shipping Board hulls and without any builder's profit $125,000, and that $110,000 was offered and refused for said lighter in 1920.

"4. The fact that the Cornelia was lost when market values of steamers were unusually high, and yet she sold on December 21, 1920 after the market had gone to pieces for $60,000.

[fol. 34] "5. The fact that the tugs Nathaniel P. Doane and Clara H. Doane were being built at this time at a cost price without builder's profit of $97,000 apiece.

"6. The fact that the tugs Astrea and Fame were being built at Fall River, Massachusetts, at this time at practically the same rate per ton as the two Doane boats.

"7. The fact that the tug James Woolley was taken by the United States government in July 1918 at $44,000 and

the Sadie Ross was taken by the United States government late in 1917 at $20,000.

"8. The fact that the demand for vessels of this type was so intense that age had very little effect on market value, and the Cornelia should have brought from three-fourths to seven-eighths as much as a new lighter.

"9. The fact that the Cornelia was a speedy steam lighter capable of doing more work in 24 hours than any lighter of similar type in the harbor of Boston.

"10. The fact that Cornelia had been used successfully in towing and could have been sold for coastwise towing purposes, for which there was an unusual demand at this time.

"11. Because a fair charter rate of the Cornelia at this time was $300 per day, and there was work for her every day of the year.

"12. Appendix A, taken from the list of Merchant vessels of the United States, gives data on all the above mentioned vessels.

[fol. 35]

Appendix A

Cornelia	285	103	128	30.9	1906	Noank, Conn.
Hercules	283	104	102.5	32.0	1906	Bath, Maine.
Ajax	536	197	133.8	29.7	1919	So. Portland, Maine.
Nathaniel F. Doane	96	43	87.4	29.2	1919	Boothbay.
Clara H. Doane	96	43	87.4	29.2	1919	Boothbay.
Astrea	415	197	142	31.6	1918	So. Somerset, Mass.
Fame	415	197	142	31.6	1918	So. Somerset, Mass.
James Woodley	92	45	86	18.6	1904	
Sadie Ross	69	27	90.5	18.6	1904	Boston

Capt. Price was a professional surveyor and appraiser of vessels and has appraised for the Court as well as for private parties. He knew and examined the "Cornelia" and was familiar with market conditions, and gave his opinion accordingly. He also referred specifically to the lighter Ajax, the Tugs Nathaniel and Clara Doane, and the Tug James Woodley, mentioned by Mr. Rowe.

Mr. Munroe was a ship broker. He said he could not testify to any sales of lighters but that he had inquiries for such vessels, including the "Cornelia," and that there was a market for them. He chartered the lighter for Mr. Snow and said he based his estimate on her value and earning capacity; that wooden hulls were selling in August, 1918, for $100 per dead weight ton, and that he thought the ves-

sel would earn $100 to $150 a day. He also had in mind Doane tugs and the James Woolley.

I find that the Ajax was a lighter a little larger than the "Cornelia," built at Portland, Maine, in 1919, from material that had been rejected by the Shipping Board because not [fol. 36] of proper size for the vessels that the Board was building. This material was acquired by the builder and owner of the Ajax, and as thus constructed she cost him $125,000. The tugs Nathaniel and Clara Doane were also built in 1919, and cost $97,000 each, and the tug James Woolley was taken by the government in July, 1918, for $45,000.

Mr. Friend described himself as a broker for ocean towing, buying and selling and chartering tugs, barges and steamers. He testified that he was familiar with the price of vessel property and the demand for boats for towing up and down the coast; that there was a scarcity of such vessels at the time of the collision, and that the "Cornelia" could have been used for the purpose and was then worth "not less" than the figure he gave.

Mr. Doven was a ship builder and built the Ajax. He testified that he was familiar with the market for lighters in August, 1918, and that the "Cornelia" could have been sold at that time.

Mr. Snow was the man who purchased, raised, repaired and afterwards sold the lighter.

Mr. Nolan gave his business as that of a ship broker, buying and selling all kinds of floating equipment. He knew the "Cornelia" and saw her as she lay aground at Fawn Bar, and said his estimate of her value was based on his general knowledge of vessels and transactions concerning them.

Whereas the reproduction figures of the witnesses previously referred to were more in the nature of rough estimates and their estimates of value were based upon their knowledge of the market, Mr. Murphy and Lieut. Commander Manning figured with some care the amount and cost of the material necessary to reproduce the "Cornelia," and [fol. 37] the item of labor, and, having thus arrived at the reproduction cost, depreciated it by a fixed method to arrive at the value of the vessel.

Mr. Murphy was a consulting engineer and marine surveyor and appraiser. After experience in ship yards in Wales he served as surveyor for Lloyd's in a number of places, including Boston, until 1914, when he went into business for himself. In 1918 he was appointed by the United States Shipping Board to the Ocean Advisory Committee, so called, which was organized to advise the Board what should be paid the owners for vessels seized by the Board or sunk while on its hands. The Committee devised a method for arriving at a fair price, which in the case of the smaller floating craft was as follows: After determining the reproduction cost of the vessel, the figure was depreciated at the rate of 2½ per cent a year for each year of the vessel's age, or one-half the normal deduction for depreciation of 5 per cent. For the first year the percentage was figured on the cost, and thereafter on the value as depreciated for the previous year. Murphy used this method with respect to the "Cornelia" and arrived at the figure given above as the value of the vessel at the time of the collision. He also referred to the cost price of wooden tow boats about 94 feet in length contracted for by the government in 1918, including 8 at $156,000 each, 6 at $152,600, 5 at $151,900, 3 at $133,900, 6 at $151,900, and 7 at $166,100. He said he thought the lighter would cost to build about 20 per cent less than a tow boat.

Lieut. Commander Manning was a graduate of the Naval Academy and at the time of his testimony attached to the Construction Corps of the Navy and in charge of the preparation of plans and estimates for all the construction work at the Charlestown Navy Yard, including the modernization of the battleships Florida and Utah. As the means of determining value of the "Cornelia," after arriving at her [fol. 38] reproduction cost, he used the formula adopted by the Joint Merchant Vessel Board, so called, which was composed of officers of the Army and Navy and appraised vessels taken over by their departments for the use of the United States. This method, in the case of vessels of the type of the lighter, was to depreciate the reproduction cost 4⅓ per cent a year for each year of the age of the vessel. As the lighter was 12 years old, this resulted in a depreciation of 57 per cent and an estimated value of 43 per cent of her reproduction cost as against 77 per cent in the case

of the formula used by Mr. Murphy. The Commander tabulated his estimates in a statement introduced as U. S. Exhibit Q, and he referred to six freight lighter hulls without power, capacity 250 tons, which were built at the Navy Yard in 1918 for $28,211 each. He thought that notwithstanding that the "Cornelia" was larger, she could have been built for the same price because of certain features of the construction of the Navy Yard lighters, and his estimate of the cost of reproducing the hull of the "Cornelia" was $31,793.60. He also mentioned some wooden harbor tugs 88 feet in length which the government had built in the latter part of 1918 and the first part of 1919 at the average cost of about $91,000.

Lieut. Lord at the time of his testimony was attached to the Charlestown Navy Yard as superintendent of the reconstruction of the frigate Constitution, and was referred to by Commander Manning as the outstanding wooden expert of the Navy. Lord went over the Commander's reproduction figures and raised them to $102,000, as has been stated, and judging from the work in which the lighter was engaged placed her value at $45,000.

The qualifications of Commander Manning are not to be questioned, though his experience was for the most part with steel vessels, and he made an excellent impression. But I think that his estimate of the cost of reproducing the [fol. 39] "Cornelia" was too low, and that an annual depreciation of 4¼ per cent in arriving at the value of the lighter was too much in view of the conditions brought about by the war, as a consequence of which the age of the vessel, if capable of service, had little effect upon her value as compared with normal times. Although the work of the lighter subjected both machinery and hull to hard usage, she was well kept up. The repair bill for the 12 months preceding August, 1918, amounted to $9,783.79, and I find that the vessel was in good condition and regularly employed at the time of the collision.

See the opinion in

Standard Oil Co. v. Southern Pac. Co., 268 U. S., supra, where the Court said, pp. 158 ff.:

"In August, 1918 the immediate demand for ships was greater than the supply; the shipyards were working to

full capacity; wages and prices were high; the trend of construction costs was upward and the element of time was of the utmost importance. The witnesses on both sides testified that such conditions make for a lower rate of depreciation to be taken into account in determining value * * * Plainly, conditions in 1918 justified a smaller deduction from cost of reproduction new than before the war, and made value of a vessel in good condition and ready for use approach more nearly its value new."

Mr. Murphy and Manning were in substantial agreement as to the amount of material necessary to reproduce the lighter. Their differences were largely over items of cost. The Commander got his prices from Navy sources as costs to the government in its own yards, that is, what it would cost the government to build, not what a builder would [fol. 40] charge a private client. In other words, he left out of consideration the private builder's risk and profit. It was admitted that the "Cornelia" could not have been rebuilt in a government yard, and therefore, so far as the cost of a new vessel was concerned it was the price that a private builder would charge.

Manning's estimate of the value of the "Cornelia" was less than the Navy Department paid for the Hercules, which was not so valuable a vessel, and less than the price which Snow got for the "Cornelia" in December, 1920, at a time when the market was not as good as it was in August, 1918. This is true, also, of the estimates of Lieut. Lord and Mr. Nolan. And it is to be noted further respecting the price for which the "Cornelia" when repaired was sold, that the fact that a wooden vessel has experienced a serious accident tends to depreciate her sale value. All of the expert witnesses testified that the pounding of a vessel on a hard bottom results in loosening the fastenings in such a way that it is difficult, and sometimes, impossible, to restore the vessel to her previous condition. As Mr. Snow graphically put it, the effect is to loosen everything, like a basket or an old chair. He said the "Cornelia" was a strongly built vessel, with excellent workmanship, and that he found no rotten wood in her except her bits, which did not amount to anything; but that whereas after he repaired her she was fairly tight, she would wring and twist all the time that he owned her.

The Hercules, like the "Cornelia," was a steam lighter and built the same year, but was smaller and of different design, having a length of only 102 feet, with a beam of 32 feet as compared with the Cornelia's length of 128 feet and beam of 30.9 feet. And she had a full bow, square bilges, and a scow stern. The result was that she was slower and less economical than the injured vessel. Sannie Rowe, who had the Hercules built before he became [fol. 41] connected with the libellant, and who, as libellant's office superintendent, oversaw the operation of both vessels, testified that the "Cornelia" would make two trips to the Hercules one and he thought was worth twice as much. The Hercules was appraised for the Navy as in "fair running condition" and worth $45,000, arrived at, it was assumed, by the same formula that Commander Manning used for his estimate of the value of the "Cornelia." And the government actually paid for the Hercules $50,000.

I attach great weight under the circumstances of the case to the testimony of the witnesses who knew the "Cornelia" and the state of the market at the time of the collision. Depreciating the cost of reproduction to determine value is merely a means to an end, and it appeared that different formulas were employed by different agencies of the government. Then the cost of reproduction had first to be determined, and under the conditions existing in August, 1918, that cost could only be approximated at best, and the estimates variously greatly. Finally, as the Supreme Court said in the Standard Oil case, "value is the thing to be found" and " is not a matter of formulas" but of "a reasonable judgment having its basis in a proper consideration of all relevant facts."

Finding on Value

I have endeavored to follow the direction of the Court, and on all evidence find that the value of the "Cornelia" at the time of the collision was $95,000.

Expenses

It is said that in addition to her value the owner of the injured vessel may recover "the necessary expenses of

raising her, when that is necessary to determine whether she can be repaired advantageously."
[fol. 42] The Reno, supra, at p. 556.

And the libellant presented the following bills:

Wm. B. Price	$25 00
Robert H. Fraser	35 00
Ross Tow Boat Co.	100 00
Boston Sand & Gravel Co.	350 00
The T. A. Scott Co.	132 18
Betts Bros. & Co.	442 50
	$1,084 68

The bills of Price and Fraser were for services as surveyors (Libellant's Exhibits 5 and 6). The bill of the Ross Tow Boat Co. I understand was for services rendered to Betts Bros. in connection with their work upon the "Cornelia" and was paid to Betts Bros. (Libellant's Exhibit 7). The bill of the Boston Sand & Gravel Co. was for 13¼ days' use of the lighter Reliance, Aug. 9 and 10, at $200 a day. (Libellant's Exhibit 8). The bill of the T. A. Scott Co. was for use of the 8 inch pump and for services of a diver and apparatus recovering suction lost overboard Aug. 9 and 10. (Libellant's Exhibit 9). And the bill of Betts Bros. & Co. was for services of tow boat, lighter and men on Aug. 9, tow boat on the 10th, tow boat, diver and crew on the 12th and 13th, and the trip to the sunken vessel on the 20th, the day of the survey. (Libellant's Exhibit 10).

All of the bills were made out to and paid by the Insurance Company with the exception of that of the Scott Co., which was made out to the libellant.

I find that the bills were incurred in the attempt to raise the vessel and to ascertain if she was worth raising, and as such are recoverable items of damage. The fact that most [fol. 43] of the expense was incurred directly by the Insurance Company it does not seem to me is of consequence. The owner was charged with the duty of minimizing the damages so far as it could, and the services charged for

were of the sort that could be secured to that end. I had some doubt at first whether the libellant's bill should be included, but as it relates to the use of a lighter which was necessary in the attempt to raise the vessel and would have had to be obtained elsewhere if not furnished by the libellant, I think the charge is proper.

Conclusion

To summarize, I determine that the amount of damages legally sustained by the libellant by reason of the collision was $96,084.68, made up as follows:

Value of the "Cornelia"	$95,000 00
Necessary expenses	1,084 68
	$96,084 68
I assume there must be deducted the sum received from the sale of the vessel	5,000 00
which leaves a balance of damages of	$91,084 68

By mandate of the Court of Appeals the libellant is to recover one half its damages, and I therefore conclude and report that the amount of the damages which the libellant is entitled to recover is $45,542.34. The allowance of interest I leave to the Court.

In re Great Lakes Dredge & Dock Co., 250 Fed. 916.

[fol. 44] I file herewith the stenographic record of the testimony before me, Volumes I-9, inc., and the exhibits, libellant's exhibits being numbered 1-22, inc. and the exhibits of the United States A to K, inc., there being two exhibits marked I.

All of which is respectfully submitted.

Fitz Henry Smith, Jr., Commissioner.

In United States District Court

Respondent's Exceptions to Commissioner's Report

Filed September 20, 1926

Now comes Harold P. Williams, United States Attorney, and George E. Farnum, Assistant United States Attor

ney, and on behalf of the respondent in the above entitled cause excepts to the report of the Commissioner filed herein and assigns as reasons therefor and enunciates as the particulars wherein the respondent is aggrieved and prejudiced, the following:

1st: The finding of the Commissioner that the libellant is entitled to recover for the value of the Cornelia at the time of the collision is unwarranted and without adequate support on the evidence.

2nd: The finding of the Commissioner in substance and effect that the Cornelia was a constructive total loss was unwarranted and without adequate support on the evidence.

[fol. 45] 3rd: The finding of the Commissioner in form, substance and effect that the libellant was not negligent in abandoning the Cornelia to the insurance company, was unwarranted and without adequate support on evidence.

4th: The finding in form, substance and effect by the Commissioner that the libellant made a reasonable effort to raise, repair and save the Cornelia, was unwarranted and without adequate support on the evidence.

5th: The finding of the Commissioner that the lighter was in an exposed place on dangerous bottom and likely to go to pieces in an easterly storm and the finding that the same was not controverted, was unwarranted and without adequate support on the evidence.

6th: The finding of the Commissioner that the collision took place when the conditions were unusual both as to the facilities for and the cost of raising and repairing a sunken vessel, so far as it has any application to the position of the libellant, was unwarranted and without adequate support on the evidence.

7th: The finding of the Commissioner in substance and effect that the libellant performed his duty in doing everything reasonable in order to minimize its damages, was unwarranted and without adequate support on the evidence.

8th: The finding of the Commissioner that the insurance company to whom the vessel was abandoned and for whose benefit the proceedings were brought, made reasonable efforts and did everything required to raised, repair and

save the vessel, was unwarranted and without adequate support on the evidence.

[fol. 46] 9th: In deciding the issue of the case involving the attempts to raise the Cornelia, the assessor ignored important material testimony and accorded to other testimony undue and unreasonable importance.

10th: The determination that the value of the Cornelia at the time in question was $95,000, was unwarranted and without adequate support on the evidence.

11th: The decision as to the value of the Cornelia at the time in question is excessive and exorbitant.

12th: The decision as to the value of the Cornelia at the time in question is grossly excessive and clearly exorbitant.

13th: The determination that the damages sustained by the libellant by reason of the Commissioner, $96,084.68 was unwarranted and without adequate support on the evidence.

14th: The conclusion and report that the amount of damages the libellant is entitled to recover is $45,542.34 was unwarranted and without adequate support on the evidence.

Wherefore, they pray that confirmination of the report be denied, and that these exceptions be sustained.

Harold P. Williams, United States Attorney. Geo. F. Farnum, Asst. United States Attorney.

[fol. 47] In United States District Court

Motion to Confirm Report of Assessor—Filed October 30, 1926

Now comes the libellant in the above entitled case and moves that the report of Fitz Henry Smith, Esq. now on file be confirmed, and that decree in accordance therewith be entered forthwith.

Boston Sand & Gravel Company, by Blodgett, Jones, Burnham & Bingham, Proctors.

In United States District Court

Motion Relative to Interest and Order Thereon—Filed October 30, 1926

Now comes the libellant in the above entitled case and moves that interest at the rate of 6% per annum be added to the various items of damages as found by the commissioner from the dates when said items accrued or were paid.

Boston Sand & Gravel Company, by Blodgett, Jones, Burnham & Bingham, Proctors.

[fol. 48] Feb. 23, 1927.

On the authority of Nantasket Beach Steamboat Co. vs. U. S. 297 Fed. 656, I rule that the libellant is not entitled to interest and therefore nunc pro tunc as of Dec. 21, 1926, I deny the above motion.

E. H. B., D. J.

In United States District Court

Minute Entry of Hearing

Also at the same term, to wit, November 1, 1926, said cause was set down for hearing on the commissioner's report and fully heard by the court, the Honorable Elisha H. Brewster, District Judge, sitting.

Said cause was thence taken under advisement to the present December Term, A. D., 1926, when, to wit, December 13, 1926, an opinion of the court is announced, overruling exceptions to Commissioner's Report and confirming the report.

In United States District Court

Final Decree on Mandate—December 21, 1926

Brewster, J.:

A mandate having been received from the Circuit Court of Appeals in said cause and entered, reversing the final

decree in this case entered on July 30, 1924 with costs to the appellant-libellant, and this cause having been heard on the pleadings and proofs and having been argued and submitted by the proctors for the respective parties, and the Circuit Court of Appeals having found in its opinion dated July 7, 1925, that the damages of the libellant Boston Sand & Gravel Company were caused by the fault of both the [fol. 49] libellant and the respondent, it is therefore, in accordance with said opinion, the mandate, the interlocutory decree now on file and the report of Fitz Henry Smith, Jr., commissioner on damages, and confirmation thereof by this court, now, to wit, December 21st, 1926

Ordered, adjudged and decreed that the respondent pay to the libellant or its proctors of record one-half of the libellant's damages, said one-half damages being the sum of $45,542.34; also one half of its costs in the United States district Court, the said one-half costs being the sum of $40.86, together with full costs in the Circuit Court of Appeals in the amount of $428.45; total $46,920.65.

By the Court.

Frank H. Mason, Deputy Clerk.

Notice of hearing on entry of this decree is hereby waived without prejudice to right of appeal.

George R. Farnum, Acting U. S. Atty., Proctor for Respondent. Blodgett, Jones, Burnham & Bingham, F. M. Murphy, Proctors for Libellant.

In United States District Court

Minute Entry of Appeals

From the foregoing final decree both the United States of America and the Boston Sand & Gravel Company claim appeals to the United States Circuit Court of Appeals for the First Circuit, and said Boston Sand & Gravel Company having given good and sufficient security to prosecute its appeal to effect and answer all costs if it fail to make its plea good, said appeals are allowed accordingly.

[fol. 50] IN UNITED STATES DISTRICT COURT

OPINION—December 13, 1926

BREWSTER, J.:

The libel in this cause was brought under Special Act of Congress (42 Stat. 1590) to recover damages resulting from a collision between the United States destroyer "Bell" and the steam lighter "Cornelia," which occurred August 9, 1918, in Boston Harbor. The Circuit Court of Appeals on appeal found both the Bell and the Cornelia at fault and decreed divided damages. 7 Fed. (2d) 278. The libel was referred to Fitz Henry Smith, Jr., Esq., as commissioner, to determine the amount of damages and to report thereon to this Court. He has fixed the damages at $91,084.68 and reports that the libellant is entitled to recover $45,542.34.

The cause comes before the Court upon libellee's exceptions thereto and libellant's motion to have the report confirmed. Libellee assigns numerous grounds upon which it bases its exceptions. These may be grouped under two heads:

First. Those relating to the finding of the commissioner that the Cornelia was a constructive total loss.

Second. Those relating to the finding of the commissioner that, at the time of the collision, the value of the Cornelia was $95,000.

In his report the commissioner fully considers the evidence upon which he bases both of these findings. Respecting the finding that the Cornelia was a constructive total loss, it appears that soon after the collision the lighter was beached on what is known as "Faun Bar" outside of Deer Island. At high tide her deck was three or four feet under water. The bottom of the harbor at that point was full of bowlders of various sizes, some being as large as six or [fol. 51] seven feet high. The libellant carried insurance on the vessel and it abandoned her to the insurance company which, in turn, sold the wreck as it lay on the bottom for $5,000. The commissioner awarded the damages according to the rule of damages obtaining in cases of total

loss crediting, however, to the value of the vessel at the time of the collision the sum of $5,000 received from the sale of the wreck.

If it could be said that the Cornelia was a total loss, actual or constructive, the measure of damages adopted by the commissioner was the correct one. Smith et al. v. Condry, 1 How. 28, 11 L. Ed. 35; The Ann Caroline, 2 Wall. 538, 17 L. Ed. 833; The Baltimore, 8 Wall. 377, 19 L. Ed. 463; The Reno, 134 Fed. 555.

It does not necessarily follow, however, that because the Cornelia sank as a result of the collision this rule of damages is to be applied. The Admiralty Law casts upon the owner a duty to exercise reasonable care and attention to minimize the loss. He is required to make reasonable efforts to ascertain whether the vessel can be saved and if, as a result of such efforts, he finds that it is reasonably possible to salvage her, and that the expense of raising and restoring would not exceed her value when restored, the owner would not be justified in abandoning the vessel and exacting full compensation for her value. The Baltimore, supra; The Reno, supra; The Ernest A. Hamill, 100 Fed. 569; The Havilah, 50 Fed. 331.

It is the contention of the libellee that the owner did not exercise the reasonable care and diligence required of it in its endeavors to avoid a total loss.

It appears from the findings of the commissioner, which are abundantly supported by the testimony, that the officers of the libellant company visited the Cornelia on the day of the collision and, believing that she could be easily floated, they arranged for the patching of the hole in her bow which had been made by the Bell; hired a pump, and on the even- [fol. 52] ing of the same day, at low water, the marine superintendent of libellant undertook to get her afloat. After working two hours, it was found that water was coming in about as fast as it was being pumped out, and further efforts were suspended, to be renewed the following morning.

On the next morning the superintendent found, on arriving at the wreck, that the wind had turned east and that a sea was running, rendering it impossible to continue his operations. Parts of the afterhouse had been washed

away, and it then seemed to the superintendent that the vessel was pulling apart amidships and, in view of the fact that she was resting upon bowlders, he reached the conclusion that she would be damaged to such an extent that the cost of raising and repairing would be more than she would be worth. Furthermore, an agent for the insurance company had investigated, a diver had made an examination of the hull and had reported unfavorably, appraisers had examined the vessel, with the ultimate result that both the libellant and the insurance company had come to the conclusion that the cost of raising and repairing the vessel would exceed her value when restored. Both the libellant and the insurance company had endeavored to obtain wrecking companies to undertake the raising of the Cornelia but had not been successful in finding anyone to undertake it. The commissioner found that these wrecking companies were the only available concerns that were equipped to do that work.

Thereafter the insurance company sold the Cornelia for $5,000, as above stated. The purchaser had the necessary equipment for raising. His first attempt was not successful, but later, with comparatively little difficulty, he succeeded in getting the Cornelia afloat and she was towed to a dock in Boston, and after slight repairs were there made, she was taken to the purchaser's plant in Rockland, Maine, when she was completely overhauled at an expense of over [fol. 53] $20,000. Two years later she was sold for $60,000. In the light of subsequent events it is doubtless true that the marine superintendent, the diver and the appraisers, all of whom advised that the cost of floating and restoring the vessel would exceed her worth when restored, were probably in error, or at least unduly pessimistic, but the evidence clearly warrants the commissioner's findings on the question of negligence, which, although stated negatively, I read to import a finding that the libellant, under the circumstances as presented at the time, acted with reasonable diligence in its efforts to prevent a total loss.

Furthermore, the unsuccessful attempts on the part of the libellant and insurance company to induce available wrecking companies to undertake the salvage warrants a

finding of constructive total loss. La Normandie, 58 Fed. 427; Hughes on Admiralty, page 327.

As to the amount of damages, the commissioner followed the rule recently laid down in our Supreme Court and sought to find from all the evidence that value of the vessel which would be represented by "the sum which, considering all the circumstances, probably could have been obtained for her on the date of the collision; that is, the sum that in all probability would result from fair negotiations between an owner willing to sell and a purchaser desiring to buy." Standard Oil Co. v. Southern Pacific Co. 268 U. S. 146.

His report contains an adequate summary of the evidence considered relating to the original cost of the Cornelia; her reproduction value new; the rate of depreciation; contemporaneous sales of similar vessels; costs at that time of constructing other lighters and tugs of approximate similar construction and equipment; the condition of the market as to supply and demand and also of the testimony of the owner and experts who had seen the Cornelia and who gave opinion evidence as to her value. [fol. 54] It is a notorious fact that in the summer of 1918 prices for sea going craft reached abnormal heights. The Court, in Standard Oil v. Southern Pacific Co., supra, took occasion to observe that when the "demand for ships was greater than the supply; the shipyards were working to full capacity; wages and prices were high."

The commissioner, in his report, says:

"I attach great weight under the circumstances of the case to the testimony of the witnesses who knew the "Cornelia" and the state of the market at the time of the collision. * * * Finally, as the Supreme Court said in the Standard Oil case, "value is the thing to be found" and "is not a matter of formulas" but of "a reasonable judgment having its basis in a proper consideration of all relevant facts." * * * I have endeavored to follow the direction of the Court, and on all the evidence find that the value of the "Cornelia" at the time of the collision was $95,000."

I have carefully examined all the evidence submitted to the commissioner. I do not deem it necessary to review

that evidence in this opinion. I am convinced that the evidence abundantly warrants his findings of fact and that his findings fully justify the conclusion which he has reached respecting the value of the Cornelia at the time of the accident.

Since the commissioner adopted a proper rule of damage and proceeded along correct lines in determining the extent of that damage, and, inasmuch as his conclusions are adequately supported by the evidence, his report must be confirmed and the libellee's exceptions overruled. I so order and decrees may be entered accordingly.

[fol. 55] IN UNITED STATES DISTRICT COURT

PETITION OF THE UNITED STATES FOR APPEAL.—Filed February 11, 1927

The United States being aggrieved by the decree, dated December 21, 1926, rulings and findings of the United States District Court therein, claims an appeal from said decree, rulings and findings, and prays that its said appeal may be allowed.

United States of America, By Frederick H. Tarr, United States Attorney.

February 15, 1927.
Petition for appeal allowed:
Elisha H. Brewster, U. S. District Judge.

IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS OF THE UNITED STATES—Filed February 11, 1927

Now comes the United States of America by Frederick H. Tarr, United States Attorney, in the above entitled case, and having claimed an appeal to the Circuit Court of Appeals for the First Circuit from the final decree entered in the District Court on December 21, 1926, files these its assignments of error.

The court erred:

1. In confirming the report on damages filed by the Commissioner.

[fol. 56] 2. In finding that libelant made a reasonable effort to save the Cornelia.

3. In holding that the Cornelia was a total loss.

4. In finding that the value of the Cornelia was $95,000.

5. In not finding that the Cornelia could have been and should have been raised and repaired by the libelant.

6. In not finding that the libelant was negligent in efforts to minimize the damages.

7. In finding that libelant was justified in abandoning the Cornelia to the underwriters as a total loss.

8. In finding that the insurance company to whom the Cornelia was abandoned made reasonable efforts and did everything required to raise and repair the vessel.

9. In finding that libelant is entitled to recover for the value of the Cornelia at the time of the collision.

10. In finding that the Cornelia was in an exposed place on dangerous bottom and likely to go to pieces in an easterly storm and that such was not controverted.

11. In finding that the collision took place when conditions were unusual both as to facilities for and the cost of raising and repairing a sunken vessel.

12. In overruling each and every exception filed by the United States to the Commissioner's report.

[fol. 57] 13. In finding that the damages sustained by libelant arising out of the collision amounted to $96,084.68.

14. In finding that libelant should recover damages in the sum of $45,542.34.

United States of America, by Frederick H. Tarr, United States Attorney.

In United States District Court

Petition of the Boston Sand & Gravel Company for Appeal—Filed March 3, 1927

The libellant, Boston Sand & Gravel Company, being aggrieved by the decree of the United States District Court

herein, dated December 21, 1926, in not allowing interest and full costs to the libellant and by its ruling denying libellant's motion for interest, on the ground that the Court is unauthorized to allow it, claims an appeal from said ruling and decree upon said questions of interest and costs and prays that its said appeal may be allowed.

Boston Sand & Gravel Company, by Blodgett, Jones, Burnham & Bingham, Proctors.

March 3, 1927.

Libellant's petition for appeal allowed. Elisha H. Brewster, U. S. District Judge.

[fol. 58] In United States District Court

Assignment of Errors of the Boston Sand & Gravel Company—Filed March 3, 1927

Now comes the libellant, Boston Sand & Gravel Company, and having petitioned and appealed to the Circuit Court of Appeals for the First Circuit from the ruling on the libellant's motion for interest and the final decree entered in the District Court on December 21, 1926, files these its assignments of error.

The Court erred:

1. In disallowing motion of libellant for interest on the ground that the Court is unauthorized to allow it.

2. In entering decree without allowing the libellant interest.

3. In not holding that interest is allowable to the libellant under the Enabling Act (p. 4 of the original record in the Circuit Court of Appeals).

4. In ruling that the libellant is not entitled to interest and denying the libellant's motion for interest on the authority of Nantasket Beach Steamship Company vs. United States, 297 Fed. 656.

5. In not awarding full costs to the libellant where the libellant only brought suit and recovered half damages.

Boston Sand & Gravel Company, by Blodgett, Jones, Burnham & Bingham, Proctors.

[fols. 59-63] Bond on appeal for $250.00 approved and filed March 3, 1927, omitted in printing.

[fols. 64 & 65] Citation, in usual form, showing service on Frederick H. Tarr, omitted in printing.

[fol. 66] In United States District Court

Stipulation re Transcript of Record—Filed March 21, 1927

It is hereby agreed in the above entitled cause that the order on the praecipe heretofore made may be vacated, and that the foregoing, with the exception of the petition for appeal filed by the United States of America and order thereon, assignments of errors filed by the United States of America and said praecipe and order thereon, shall constitute the record on appeal of the Boston Sand & Gravel Company; and it is further agreed that the printed record of this case in the Circuit Court of Appeals, No. 1826 of the October Term, 1924 may be submitted in the original form to the Circuit Court of Appeals unattached to the record of the case.

Blodgett, Jones, Burnham & Bingham, Proctors for Libellant appellant. Frederick H. Tarr, Proctor for Respondent appellee.

Mar. 21, 1927. So ordered: E. H. B., D. J.

[fols. 67 & 68] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 69] In United States Circuit Court of Appeals for the First Circuit, October Term, 1926

No. 2118

Boston Sand & Gravel Company, Libellant, Appellant

v.

United States of America, Respondent, Appellee

Appeal from the District Court of the United States for the District of Massachusetts

Before Bingham, Johnson and Anderson, JJ.

Opinion—June 4, 1927

Anderson, J.:

The main question in this admiralty appeal is whether the United States is liable for interest on damages awarded under a special act not specifically providing for interest. The appellant filed on May 29, 1922, a libel to recover damages arising out of a collision of the United States Government Destroyer Bell with the Cornelia, on August 9, 1918, in Broad Sound Channel in Boston Harbor. On appeal from a finding in favor of the Government, this court held, 7 Fed. (2d) 278, both vessels at fault and that the damages to the vessels should be divided. On proceedings pursuant to the mandate, the court below, affirming a finding of the Commissioner, entered judgment for the libellant for $45,542.34, one-half the damages without interest, and for one-half the costs in that court. By this appeal the appellant [fol. 70] seeks to recover interest at 6 per cent from the date of the collision, and full costs. The suit is brought under a special act of May 15, 1922, 42 Stat. 1590, which reads:

"That the claim of the owner of the steam lighter Cornelia arising out of a collision between said steam lighter and the United States Destroyer Bell in Broad Sound, Boston Harbor, Massachusetts, on the ninth day of August, 1918, for and on account of the losses alleged to have been suffered in said collision by the owner of said steam lighter

Cornelia by reason of damages to or the loss of said steam lighter, her boats, engines, boilers, tackle, apparel, furniture and supplies, may be submitted to the United States Court for the District of Massachusetts, under and in compliance with the rules of said court sitting as a court of admiralty; and that the said court shall have jurisdiction to hear and determine the whole controversy and to enter a judgment or decree for the amount of the legal damages sustained by reason of said collision, if any shall be found to be due either for or against the United States, upon the same principle and measure of liability with costs as in like cases in admiralty between private parties with the same rights of appeal: Provided, that such notice of the suit shall be given to the Attorney General of the United States as may be provided by order of the said court, and it shall be the duty of the Attorney General to cause the United States attorney in such district to appear and defend for the United States; Provided, further: That said suit shall be brought and commenced within four months of the date of the passage of this Act."

The appellant's chief reliance is a decision by the Court of Appeals for the Second Circuit, dated January 10, 1927, —New York & Cuba Mail S. S. Co. v. United States, 16 Fed. (2d) 945, 947. In that case, that learned court, construing the special act of February 28, 1923, 42 Stat. 1378, which mutatis mutandis is identical with the Act here in question, sustained the claim for interest, overruling the court below. The grounds of that decision appear in the following excerpt from the opinion of Circuit Judge Manton:

"By the authority of the statute, the appellee may maintain its libel, as it would between private parties. In a suit between private parties in admiralty growing out of collision, it has long been settled that interest is awarded as [fol. 71] a part of the measure of damages. The object of the award of damages is to place the injured party in the same pecuniary position as he would have been in but for the collision.

"This principle has been referred to in admiralty as that of the right to a full and complete indemnity. The phrase the legal 'damages * * * found to be due * * *

upon the same principles and measures of liability as in like cases in admiralty between private parties,' when given the interpretation intended by Congress in this enactment, included an award of interest, as is allowed in the case of a litigation between private parties in admiralty. The United States is not liable to pay interest in the absence of a statutory provision to that effect, except where it has contracted to pay, or where the United States submits itself to the jurisdiction of the court, or, if sued, places itself in the position of a private party. United States v. Thekla, 266 U. S. 340, 45 S. Ct., 112, 69 L. Ed. 313. Interest may be provided for by the name of legal damages. Congress has done so in granting this relief to private parties, where a vessel has been injured in collision with a public vessel. We must give to the language employed its ordinary and accepted meaning. We must presume that Congress intended that the principle of restitutio in integrum should be applied, as it is in cases in admiralty of like nature between private parties. In The Paquete Habana, 189 U. S. 453, 23 S. Ct. 593, 47 L. Ed. 900; Nuestra Senora de Regla, 108 U. S. 92, 2 S. Ct. 287, 27 L. Ed. 662

"In U. S. ex. rel. Angarica v. Bayard, 127 U. S. 251, 8 S. Ct. 1156, 32 L. Ed. 159, interest was disallowed, and this, because interest is not collectible against the government, except where the government stipulates to pay interest, or where interest is given expressly by an act of Congress, either by the name of interest or by that of damages. That case is distinguishable because there was no such exception. In Seaboard Air Line Ry. v. United States, 261 U. S. 299, 43 S. Ct. 354, 67 L. Ed. 664, the Supreme Court pointed out the exception within the doctrine of the Angarica case, where a statute employed terms so comprehensive as to require allowance of interest, and allowed interest as just compensation. The present act of Congress, upon which this libel is maintainable, provides for the jurisdiction, adjudication of conflicting claims of the government and a citizen, and requires such adjudication, including the measure of damages, to be made in the same legal method as private controversies are adjudicated. The intention of [fol. 72] Congress is clear and explicit to grant full in-

demnity in the award against the United States, if any is made. Indemnity is not complete without interest. The admiralty courts in suits against private persons have always followed this rule. We think Congress intended that it should be followed in this instance."

We agree with that court that the question is purely one of statutory construction; what was the intent of Congress? The difficulty we find in according with the conclusion there reached is grounded in large part on the history of analogous legislation.

We start with the well-settled principle that the United States is not liable to pay interest on claims against it, in the absence of a plain statutory provision to that effect. In United States v. Bayard, 127 U. S. 251, 260, the court said:

"It has been established, as a general rule, in the practice of the government, that interest is not allowed on claims against it, whether such claims originate in contract or in tort, and whether they arise in the ordinary business of administration or under private acts of relief, passed by Congress on special application. The only recognized exceptions are, where the government stipulates to pay interest and where interest is given expressly by an act of Congress, either by the name of interest or by that of damages."

In this Circuit there are two well-considered decisions, prior to this case, in which District Judges have held interest not recoverable under conditions indistinguishable from those now before us: The first is Pennell v. United States (D. C.), 162 Fed. 75, a decision by Judge Hale; and the second is by Judge Brewster in Nantasket Beach Steamboat Co. v. United States, 297 Fed. 636.

The next step in determining the intent of Congress, and a very important one, was the passage on March 9, 1920, of

"An Act authorizing suits against the United States in admiralty, suits for salvage services, and providing, for the release of merchant vessels belonging to the United States from arrest and attachment in foreign jurisdictions, and for other purposes." 41 Sts. 525.

This legislation recognizes the Government's new situation as the effective owner or operator of merchant vessels

[fol. 73] on the high seas. The Act provides that such Government vessels and their cargoes shall be exempt from seizure; but that libels in personam may be brought against the Government, very much as against private parties. For present purposes, the provisions in § 3 are significant. That section provides:

"That such suits shall proceed and shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties. A decree against the United States or such corporation may include costs of suit, and when the decree is for money judgment, interest at the rate of 4 percentum per annum until satisfied, or at any higher rate which shall be stipulated in any contract upon which such decree shall be based. Interest shall run as ordered by the court."

This Act was obviously intended to provide generally for the Government's obligations as effective owner and operator of merchant vessels or tugs, but did not cover naval vessels. The result was that numerous special acts were passed covering the Government's possible liability for collisions with its naval vessels. These acts are, mutatis mutandis, identical with the Act under which the present suit was brought. Compare Act of February 28, 1923, 42 Stat. 1378, for the relief of owners of the steamship Esperanza; Act of May 15, 1922, 42 Stat. 1589, for the relief of the owners of the Horatio G. Foss.

The next important indication of the intention of Congress as to the payment of interest on damages arising out of its statutory liability in admiralty, is found in the Act of March 3, 1925, 43 Sts. 1112.

That Act is entitled:

"An Act authorizing suits against the United States in admiralty for damage caused by, and salvage services rendered to, public vessels belonging to the United States, and for other purposes."

In § 2 is the following:

"Such suits shall be subject to and proceed in accordance with the provisions of an Act entitled 'An Act authorizing [fol. 74] suits against the United States in admiralty, suits

for salvage services, and providing for the release of merchant vessels belonging to the United States from arrest and attachment in foreign jurisdictions, and for other purposes,' approved March 9, 1920, or any amendment thereof, in so far as the same are not inconsistent herewith, except that no interest shall be allowed on any claim up to the time of the rendition of judgment unless upon a contract expressly stipulating for the payment of interest."

Here is an express provision that the United States shall not be liable for interest in cases arising from collisions with public or naval vessels, like the one now at bar, until judgment is rendered.

We are faced then with this question: Did Congress, when it passed these numerous private acts to relieve parties who alleged that they had suffered injury from collisions with naval vessels, intend to give successful litigants in such suits interest at 6 per cent, when, under the Act of 1920, covering collisions with merchant vessels, interest was limited to 4 per cent, to "run as ordered by the court?" We cannot think that Congress under these private acts intended to give a more generous remedy to the parties injured by such collisions with naval vessels than were available to those bringing suits under the General Act of 1920.

Apparently the court in the Second Circuit reached its conclusion as to the construction of these private acts without having its attention directed to the provision as to interest in the general act of 1920. To our minds, this provision in the general act is far more significant as to the purpose of Congress than is the somewhat general (and not unambiguous) language used in all these special acts,—language undistinguishable from that which Judge Hale and Judge Brewster held inadequate to overcome the inference that Congress had not expressed a clear purpose to subject the Government to the payment of interest.

Perhaps some, although not great, additional light is thrown upon the Congressional purpose by the brief discussion in the Senate on February 16, 1926, 69th Congress, [fols. 75&76] First Session, Congressional Record, pp. 3751, 3752. At that time Congress was considering like private bills for the relief of the owners of vessels injured in col-

lision with public vessels of the United States. But it appeared that, on report from the Committee on Claims, the bill, as originally drafted, had been amended by striking out after the word "damages" the words "including interest." Several of these bills were then before the Senate, and Senator King inquired (p. 3753):

"Do I understand that the interest provision has been stricken out of the bills which have just been passed, so that the judgments will not bear interest?

Mr. Copeland: Yes. The words 'including interest' were stricken out of the bills."

In argument it is stated that there is a very large number of such private acts and many millions claimed. Under these conditions, a decision by the Supreme Court will doubtless, and appropriately, be sought.

A minor contention of the appellant is of error by the court below in awarding only one-half costs. It is conceded that costs are within the discretion of the court. But it is stated that in this case, in the office of the appellant's counsel, the decree was inadvertently drawn, dividing both the damages and the costs; so that the court below did not exercise its discretion or have the rule in this circuit brought to its attention. Clearly, counsel for the appellant is correct in his contention as to the general rule in this Circuit; Penn. R. R. Co. v. Golden, 243 Fed. 256, 258, and cases cited; The Baltimore, 283 Fed. 728, 731.

Under these circumstances, we think this merely inadvertent error should be corrected in this court. Accordingly the judgment below must be affirmed as to damages, but with full costs in the court below to the appellant. In this court, under the circumstances, the Government is entitled to its costs.

The decree of the District Court is modified to include full costs for the libellant, appellant, and so modified is affirmed; the appellee recovers costs in this court.

[fols. 77 & 78] In United States Circuit Court of Appeals for the First Circuit

[Title omitted]

Boston, Mass., June 15, 1927.

Notice of within petition is hereby accepted and delivery of a copy of the same is hereby acknowledged on behalf of the United States of America.

A. Chesley York, Assistant U. S. Attorney.

[fol. 79] In United States Circuit Court of Appeals

[Title omitted]

Petition for Rehearing

To the Honorable the Chief Justice and Associate Justices of the United States Circuit Court of Appeals for the First Circuit:

The petition of Boston Sand & Gravel Company respectfully prays for an order for a reargument and rehearing in the above entitled cause solely on the question of interest for the following reasons:

[fol. 80] First

Subsequent to the argument of the cause in this court petitions for writs of certiorari filed by the United States of America in the United States Supreme Court in two cases in which interest was allowed to the libellant by the circuit court of appeals for the second circuit under special acts identical with the act in the present case, have been denied.

In its brief the libellant cited and relied upon the cases of New York & Cuba Mail S. S. Co. vs. United States, 16 Fed. 2nd 945, (Libellant's Brief, page 14), and Texas Co. vs. United States, 16 Fed. 2nd 948, (Libellant's Brief, page 16), two decisions by the Circuit Court of Appeals for the Second Circuit, in which interest at the rate of six

per cent (6%) per annum was allowed to the libellant, in each instance under a special Act of Congress identical in phraseology with the special Act under which the present suit has been brought. (See Opinion, page 2 and Appellant's Brief, pages 27 and 28.

The United States of America petitioned for writs of certiorari in these cases, which petitions were pending when the present case was argued in the Circuit Court of Appeals for the First Circuit on April 29, 1927. On May 31, 1927, the United States Supreme Court denied the petitions in cases docketed Nos. 1064, 1065, and 1055 respectively, (certified copies of orders denying same are hereto annexed marked "A," "A1" and "B"); and on June 2, 1927, the decision in the present case came down from this Court.

Referring to cases in the United States Supreme Court [fol. 81] on petitions for certiorari, Mr. Chief Justice Taft in a statement made June 8, 1927, said:

"A very great error has crept into the mind of the public and of the bar in an assumption that the examination of cases upon application for certioraris (that is an examination to determine whether the cases are important enough to come into the court) is arbitrary without examination and submitted to the discretion of one member of the court.

Nothing could be further from the fact. * * *

The examination of the briefs and records and petitions for certiorari in those cases were not mere superficial glances at the petitions but they involved a real examination of each case."

The case was called by the Chief Justice, a resume made of the result of the examination of the briefs and record which each member of the court had made, the case was disposed of and then voted upon, and if four members of the court voted to allow the case to come in for consideration on its merits, the writ of certiorari was granted. (The United States Daily, June 9, 1927, page 2.)

That the petitions for writs of certiorari in the Second Circuit cases referred to were denied notwithstanding that the United States Supreme Court knew that the question presented was an important one, is apparent, as the United States in its petition in the New York & Cuba Mail Steam-

[fol. 82] ship Company case (page 4) gives as one of its reasons for granting a writ of certiorari.

"The question is an important one to be decided by this Court. Approximately 140 libels filed by authority of Private Acts, demanding damages of $5,000,000, are pending in the District Courts; 142 additional libels, demanding over $3,650,000, have been filed in the Bering Sea cases where the losses occurred during the years 1886-1896. Of these, approximately 30 have been tried and decrees, without interest, have been entered and paid. The cases for the most part relate to collision losses with public vessels which have occurred during the war period—1917-1919."

In short, the denial of certiorari, in these cases may be taken as an expression of opinion by the United States Supreme Court as to the merits of the cases.

It is apparent from the opinion that the denial of the petitions for writs of certiorari in the two Second Circuit cases was not known by this Court and we submit that the denial of the petitions is sufficient indication of the views of the United States Supreme Court to warrant this Circuit Court of Appeals allowing interest to the libellant in the present case.

[fol. 83] Second

The Texas Company vs. United States decision in the Circuit Court of Appeals for the Second Circuit was apparently not considered by this court.

Although the libellant in its brief specifically referred to and relied upon the case of Texas Co. vs. United States, 16 Fed. 2nd 948, (Libellant's Brief, page 16) it is stated in the opinion that the appellant's chief reliance is a decision by the Circuit Court of Appeals for the Second Circuit, referring to New York & Cuba Mail S. S. Co. vs. United States. The other decision by the same court in which interest was allowed was not referred to in the opinion of this Court.

Third

The act of March 9, 1920, upon which this court relies to disallow interest actually has an opposite application to the present case.

The decisions under this Act of March 9, 1920, cited by the libellant in its brief, (p. 17) allow interest from the inception of the cause of action at four per cent (4%) per annum,

Middleton vs. United States, 286 Fed. 548.
United States vs. Certain Subfreights Due the Neponset, 4 Fed. 2nd 132, D. Ct., Mass.

[fol. 84] which is an indication of the intent of Congress to allow interest, and this Court can make the interest rate four per cent (4%) or six per cent (6%) at its discretion.

Fourth

The discussion in Congress referred to by this court in its opinion (pages 6 and 7) is not pertinent to the question of allowance of interest under the special act in the present case.

In the trial of the present case no evidence of this discussion was introduced. It concerned an entirely different special Act. The petitioner submits that this discussion in the Senate concerning another Act has no bearing on the intent of Congress as to the allowance of interest when it passed the special Act in the present case. The discussion took place on February 23, 1926, nearly four years after the passage of the special Act under which the present suit is brought. There was no striking out of the word "interest" in the present Act as was done in that case. Congress has given consideration to the facts occasioning various acts seeking admiralty relief and in some cases has specifically allowed interest, and in other cases has passed upon the merits and given relief in a stated amount. For particular instances where interest has been specifically included see:

(a) 43 Stat., Part 2, page 1369, June 3, 1924 (affording relief to Colonial Navigation Company, owner of S. S. Lexington.)

[fol. 85] (b) 43 Stat. Part 4, page 1374, June 7, 1924, (affording relief to Thompson-Vache Boat Co., owner of S. S. Floyd.

(c) 43 Stat. Part 2, page 1589, March 3, 1925, (affording relief to Mallory Steamship Company, owner of S. S. Neuces, although the collision occurred 17 years prior to the Act.)

In short, no intent of Congress as to the allowance of interest can be found in a discussion in Congress except its intent as to the particular Act under consideration.

Blodgett, Jones, Burnham & Bingham, Proctors for Boston Sand & Gravel Company, Libellant, Appellant, Petitioner. Foye M. Murphy, Edward A. Neiley, of Counsel.

I, Foye M. Murphy, of counsel for Boston Sand & Gravel Company, do hereby certify that in my opinion the above petition is well founded.

Foye M. Murphy.

[fol. 86] Supreme Court of the United States, October Term, 1926

No. 1064

The United States of America, Petitioner,

v.

New York and Cuba Mail Steamship Company, as Owner of the Steamship "Esperanza"

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit

On consideration of the petition for a writ of certiorari herein to the United States Circuit Court of Appeals for the Second Circuit, and of the argument of counsel thereupon had, it is now here ordered by this Court that the said petition be, and the same is hereby, denied.

May 31, 1927.

A true copy.

Test:

Charles Elmore Cropley, Clerk of the Supreme Court of the United States. (Seal.)

[fol. 87] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1926

No. 1065

THE UNITED STATES OF AMERICA, as Owner of the Torpedo Boat Destroyer "Connor," Petitioner,

v.

STEAMSHIP "ESPERANZA," etc., NEW YORK AND CUBA MAIL STEAMSHIP COMPANY

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit

On consideration of the petition for a writ of certiorari herein to the United States Circuit Court of Appeals for the Second Circuit, and of the argument of counsel thereupon had, it is now here ordered by this Court that the said petition be, and the same is hereby, denied.

May 31, 1927.

A true copy.

Test:

Charles Elmore Cropley, Clerk of the Supreme Court of the United States. (Seal.)

[fol. 88] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1926

No. 1055

THE UNITED STATES OF AMERICA, Owner of the Steamship "Frederich Der Grosse," Petitioner,

v.

THE TEXAS COMPANY, Owner of the Steamship "Texas"

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit

On consideration of the petition for a writ of certiorari herein to the United States Circuit Court of Appeals for the

Second Circuit, and of the argument of counsel thereupon had, it is now here ordered by this Court that the said petition be, and the same is hereby, denied.

May 31, 1927.

A true copy.

Test:

Charles Elmore Cropley, Clerk of the Supreme Court of the United States. (Seal.)

[fols. 89 & 90] In United States Circuit Court of Appeals

Final Decree—June 4, 1927

This cause came on to be heard April 29, 1927, upon the transcript of record of the District Court of the United States for the District of Massachusetts, and was argued by counsel:

Upon consideration whereof, it is now, to wit, June 4, 1927, here ordered, adjudged and decreed as follows: The decree of the District Court is modified to include full costs for the libellant, appellant, and so modified is affirmed; the appellee recovers costs in this court.

By the Court.

Arthur I. Charron, Clerk.

In United States Circuit Court of Appeals

Order Denying Rehearing—June 28, 1927

No judge who concurred in the decree entered June 4, 1927, desiring a rehearing, it is ordered that the petition for rehearing filed June 15, 1927, be, and the same hereby is, denied.

By the Court.

Arthur I. Charron, Clerk.

Thereafter, to wit, on August 5, 1927, mandate is issued to the District Court.

Clerk's certificate to foregoing transcript, omitted in printing.

[fol. 91] In United States Circuit Court of Appeals

Stipulation re Transcript of Record—Filed September 14, 1927

It is hereby stipulated and agreed in the above-entitled case, that whereas the printed record of the case in the Circuit Court of Appeals, No. 1826 of the October Term, 1924, contains no matter material to the issues involved in appellant's petition for writ of certiorari, all matter material to said issues being incorporated in the volume herewith submitted, pages 1 to 90, inclusive, said latter shall constitute the sole record accompanying said petition for writ of certiorari.

Foye M. Murphy, Blodgett, Jones, Burnham & Bingham, Proctors for Petitioner. For the United States, A. Chesley York, Assistant U. S. Attorney, Proctor for Respondent.

Certificate to foregoing paper omitted in printing.

[fol. 92] Supreme Court of the United States

Order Allowing Certiorari—Filed November 21, 1927.

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927

No.

BOSTON SAND & GRAVEL COMPANY,
PETITIONER,
v.
UNITED STATES OF AMERICA,
RESPONDENT.

NOTICE.

The respondent is hereby notified that the annexed petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit and the annexed brief in support thereof will be submitted to the Supreme Court of the United States at the opening of court on the third day of October, 1927, or as soon thereafter as counsel can be heard.

Dated August 30, 1927.

FOYE M. MURPHY,
Counsel for Petitioner,
BLODGETT, JONES, BURNHAM & BINGHAM,
Proctors.

To JOHN G. SARGENT, *Attorney-General of the United States,*
Proctor for the UNITED STATES OF AMERICA.

WASHINGTON, September 19, 1927.

The foregoing notice is hereby accepted and delivery of a copy of the petition for Writ of Certiorari and brief in support thereof is hereby acknowledged.

JOHN G. SARGENT,
Proctor for the UNITED STATES OF AMERICA.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927

No.

BOSTON SAND & GRAVEL COMPANY,
PETITIONER,
v.
UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of Boston Sand & Gravel Company respectfully represents to this Honorable Court as follows:

On August 9, 1918, the steam lighter Cornelia, owned and operated by your petitioner, while proceeding outbound from the port of Boston through Broad Sound channel was in collision with the United States destroyer Bell, as a result of which collision the Cornelia was ripped open, beached and became a total loss.

By virtue of a special Act of Congress, approved May 15, 1922 (Record, p. 70), your petitioner on May 29, 1922, brought a libel in the United States District Court for the District of Massachusetts against the United States of America to recover damages arising out of said collision. In said District Court the Cornelia was held solely at fault and the libel was dismissed (298 Fed. Rep. 768). Upon appeal, the Circuit Court of Appeals for the First Circuit held both vessels at fault (7 Fed. Rep. 2d, 278) and a mandate issued to the District Court reversing the final decree of said court and directing further proceedings not inconsistent with the opinion. A Commissioner there-

upon found (Record, pp. 9, 43) total damages for the libellant (no claim of damage being made by the respondent) in the amount of $91,084.68, and your petitioner was awarded one-half of this amount, i. e., $45,542.34, which findings were confirmed by the District Court (Record, pp. 48, 50) (16 Fed. Rep. 2d, 643). Following the usual practice in said Circuit, the Commissioner made no finding as to interest, but reported the data from which interest could be computed. Thereupon your petitioner filed a motion seeking interest upon the various amounts of damages as found by the Commissioner (Record, p. 47). Said motion was disallowed (Record, p. 48) solely on the ground of lack of authority of the court and not by reason of any exercise of discretion of the court "on the authority of *Nantasket Beach Steamboat Company* v. *United States*, 297 Fed. 656". The decree of the District Court in accordance with this ruling omitted interest (Record, p. 48). Appeal was duly claimed, and the Circuit Court of Appeals for the First Circuit on June 4, 1927, disallowed interest (19 Fed. Rep. 2d, 744; 1927 A. M. C. 1239, Record, p. 69) and later denied libellant's petition for a rehearing upon the question of interest (Record, p. 89).

A certified copy of the agreed record in the Circuit Court of Appeals is herewith furnished as part of this application.

Your petitioner respectfully prays that said petition may be allowed for the following reasons:

1. The question presented is important, affecting as it does many cases now pending in the federal courts involving large sums of money.

2. There exists at present in the First and Second Circuits a conflict of law upon this question of allowance of interest.

3. The Circuit Court of Appeals for the First Circuit gave weight to a certain discussion in Congress immaterial, irrelevant, incompetent and not a part of the evidence or record in the present case.

4. The doctrine of immunity of the United States from liability for interest has no application to interest as an item of damages in a collision case in admiralty.

5. The United States of America has authorized by the special Act of Relief in the present case the allowance of interest against it in this action.

In support of these contentions the Petitioner respectfully submits its brief hereto subjoined.

WHEREFORE your petitioner respectfully prays that a Writ of Certiorari may issue out of and under the seal of this court directed to the United States Circuit Court of Appeals for the First Circuit commanding said court to certify and send to this Honorable Court on a day certain to be therein designated a transcript of the court record and all material proceedings of said Circuit Court of Appeals, to the end that said case may be reviewed and determined by this court upon said question of interest as provided by the law and practice of a court of admiralty, and that your petitioner may have such other and further relief in the premises as to this court may seem just and proper.

BOSTON SAND & GRAVEL COMPANY,
by PAUL P. BIRD,
President and General Manager.

COMMONWEALTH OF MASSACHUSETTS.
SUFFOLK, SS. BOSTON, September 16, 1927.

Paul P. Bird, being duly sworn, deposes and says that he is president and general manager of the Boston Sand & Gravel Company, petitioner above named, and that the matters stated in the foregoing petition are true to the best of his knowledge, information and belief.

PAUL P. BIRD.

Subscribed and sworn to before me this sixteenth day of September, 1927. Margaret C. McManus

~~FOYE M. MURPHY~~, [SEAL]
Notary Public.

I hereby certify that the foregoing petition is presented in good faith and not for the purpose of delay, and that in my opinion the case is a proper one for the issuance of a Writ of Certiorari.

FOYE M. MURPHY,
Counsel for the Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927.

No.

BOSTON SAND & GRAVEL COMPANY, PETITIONER,

v.

UNITED STATES OF AMERICA, RESPONDENT.

BRIEF FOR THE PETITIONER

IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF THE CASE.

The question presented by this petition is whether your petitioner is entitled to recover interest as a part of its damages in a suit brought in admiralty in the United States District Court for the District of Massachusetts by virtue of a special Act of Congress which allows the claim of the owner of the steam lighter Cornelia to be submitted to said court

> "under and in compliance with the rules of said court sitting as a court of admiralty; and that the said court shall have jurisdiction to hear and determine the whole controversy and to enter a judgment or decree for the amount of the legal damages sustained by reason of said collision, if any shall be found to be due either for or against the United States, upon the same principle and measure of liability with costs in like cases in admiralty between private parties with the same rights of appeal". (Record, p. 70.)

The Circuit Court of Appeals for the First Circuit has denied its right to allow interest. This contention is challenged by your petitioner for the following reasons, as set

forth in abstract in its petition, to which this brief is hereto subjoined:

I. The question presented is important, affecting as it does many cases now pending in the Federal Courts involving large sums of money.

Proctor for the United States of America has stated in his brief in the Circuit Court of Appeals that there were 140 libels by authority of private Acts demanding damages of $5,000,000, and in addition 142 libels in the Bering Sea cases, pending in the Federal Courts (see Record, p. 82) to which facts the Circuit Court of Appeals for the First Circuit refers as follows: "under these conditions a decision by the Supreme Court will doubtless and appropriately be sought". 19 Fed. Rep. 2d, 744 at 747 (Record, p. 75).

II. There exists at present in the First and Second Circuits a conflict of law upon the question of allowance of interest against the United States of America.

The Circuit Court of Appeals for the *First Circuit* in the present case disallowed interest as a matter of right (Record, p. 69; 19 Fed. Rep. 2d, 744), whereas the Circuit Court of Appeals for the *Second Circuit* in the cases of *New York & Cuba Mail SS. Co.* v. *United States*, 16 Fed. Rep. 2d, 945, and *Texas Company* v. *United States*, 16 Fed. Rep. 2d, 948, allowed interest, all three cases resting upon special Acts of Congress in form "identical mutatis mutandis" (see Opinion, Circuit Court of Appeals, Record, p. 70), thereby producing a conflict of law in the First and Second Circuits.

(See for Special Acts record, p. 70, and Appendices hereto A and B.)

III. The Circuit Court of Appeals for the First Circuit gave weight to a certain discussion in the Committee on Claims in the United States Senate immaterial, irrelevant, incompetent and not a part of the evidence or record in the present Case.

Proctor for the United States of America in his brief in the Circuit Court of Appeals inserted reference to and discussion

of other special Acts in which all reference to interest had been deleted in Committee and though this matter was objected to by proctor for the libellant, nevertheless the Circuit Court of Appeals has given some weight to this discussion in its determination of the question of interest (Record, p. 74).

It is commonly known that the Committees on Claims and Congress deal individually with these special relief Acts, and influenced by the merits of the case, in some cases permit the interest phrase if drawn in the bill to remain (see 43 Stat. Part 2, p. 1369, June 3, 1924, affording relief to Colonial Navigation Company owner American steamship Lexington; 43 Stat. Part 4, p. 1374, June 7, 1924, affording relief to Thompson-Vache Boat Company, owner of the steamship Floyd; 43 Stat. Part 2, p. 1589, March 3, 1925, affording relief to Mallory Steamship Company, owner of the steamship Nueces); in other cases, as those selected by proctor for the United States of America in his brief, strike out the interest clause if inserted and in some cases the Committee has even determined the whole case on its merits and reported out a specific sum as relief.

The discussion in the Senate referred to by the Circuit Court of Appeals took place four years after the passage of the special Act in the present case. There was no striking out of the word "interest" in the present case as was done in that case. The petitioner respectfully submits that no intent of Congress as to the allowance of interest should be drawn except from the situation surrounding the particular Act under consideration, and that said discussion referred to by the Circuit Court of Appeals, not having appeared in the record of the present case, and not connected with the present case in any way, is immaterial, irrelevant and incompetent.

IV. The doctrine of immunity of the United States from liability for interest has no application to interest as an item of damages in a collision case in admiralty.

It is one of the fundamental principles of admiralty jurisprudence that an admiralty court "is bound to determine the cases submitted to its cognizance, upon equitable principles, and according to the rules of natural justice".

Benedict, Admiralty, 5th Ed. Vol. 1, Sec. 223.
The Kalfarli, 277 Fed. 391, 395 (C. C. A. 2d).

Mr. Justice Story in

The Virgin, 8 Pet. 538, 549 (8 L. Ed. 1036),

says:

> "Such courts in the exercise of their jurisdiction are not governed by the strict rules of the common law but act upon enlarged principles of equity."

The maxim of ***restitutio in integrum*** is the accepted rule in collision cases,

The Baltimore, 8 Wall. 377, 385,

and is defined as complete indemnity for the damages suffered.

The Aleppo, 7 Ben. 120, 1 Fed. Cas. 342, 343.

Interest is part of the damages; it is given "in lieu of the profit which might have been derived from the subsequent use of his vessel".

Fabre v. *Cunard Steamship Co.*, 53 Fed. 288, 293.

See also *Guibert* v. *The British Ship George Bell*, 3 Fed. 581, 588.

It satisfies the rule of ***restitutio in integrum***, which is the right of the injured party.

The Rhode Island, 20 Fed. Cas. 636, 638.

In *The America*, 1 Fed. Cas. 604,

it was said (p. 605):

> "Where the value of the thing lost, or the cost of repairs and the like, are the test or measure of recovery, and the amount of damages becomes mere matter of computation, interest is as necessary to indemnity as the allowance of the principal sums."

In *The Rabboni*, 53 Fed. 952, 957,

Judge Putnam said:

> "When not more than the value of the vessel and pending freight is given, interest should justly be added, to make complete restitution."

The Reno, 134 Fed. 555, 556.
Eastern SS. Co. v. *Great Lakes Dredge & Dock Co.*, 256 Fed. 497, 505.

In *United States* v. *Rogers*, 257 Fed. 397, 399, the court says:

> "In the rule of immunity of the government from liability for interest, the term 'interest' is generally used as meaning compensation for the use or forbearance of money, or damages for its detention."

As used in collision cases "interest" means an essential part of the damages flowing from the tort.

The question of interest in the present case is somewhat analogous to the situation where a taxpayer seeks by suit to recover a tax illegally exacted. The United States Supreme Court has held that he is entitled to interest from the time of the illegal exaction.

Treat v. *Farmers Loan & Trust Co.*, 185 Fed. 760.
Erskine v. *Van Arsdale*, 15 Wall. 75,

in which latter case Waite, C. J. (p. 77) noted that the ground for the refusal to allow interest is the presumption that the Government is always ready and willing to pay its debts. There was no statutory provision for the allowance of interest in the *Erskine* case and no stipulation to pay it, yet it was allowed.

Similarly, interest has been awarded the owner of a vessel illegally condemned in prize cases, in the absence of statute or stipulation, in decrees against the United States and the captors jointly.

The Labuan, Blatchford's Prize Cases, 165.
The Sybil, Blatchford's Prize Cases, 615.
The Nuestra Senora de Regla, 108 U. S. 92, 104.

In *The Paquete Habana*, 189 U. S. 453, 467, interest was recognized as proper though the decree was entered solely against the United States.

In *United States* v. *The Thekla*, 266 U. S. 328, the court says (p. 341):

> ". . . the reasons are strong for not obstructing the application of natural justice against the Government by technical formulas when justice can be done without endangering any public interest."

We submit, therefore, that where the United States sheds its sovereign immunity and becomes a party respondent, it is thereby subject to legal damages and interest is part of these damages. This is true though a statute does not authorize its allowance. The appellant, however, need not base its claim for interest on this general ground. The relief Act in the present case includes interest.

V. The United States of America has authorized by the special Act of relief in the present case the allowance of interest against it in this action.

This Act provides:

> " That the *claim* of the owner of the steam lighter Cornelia rising out of a collision between said steam lighter and the United States destroyer Bell in Broad Sound, Boston Harbor, Massachusetts, on the 9th day of August, 1918 . . . may be submitted to the United States Court for the District of Massachusetts, under and in compliance with the rules of said court *sitting as a court of admiralty*; and that said court shall have jurisdiction to hear and determine the whole controversy and to enter a judgment or decree for the amount of the *legal damages* sustained by reason of said collision, if any shall be found to be due either for or against the United States, *upon the same principle and measure of liability with costs in like cases in admiralty between private parties with the same rights of appeal*. . . ." (Italics ours.)

Special Acts with identical material phraseology have been construed as authorizing the allowance of interest.

(a) *The Commonwealth*, 297 Fed. 651, Dist. Court S. D. N. Y. (1923), where under a special Act (quoted in full in

the report) the New England Steamship Company brought a suit rising out of a collision between its steamer Commonwealth and the United States battleship New Hampshire in Newport Harbor, R. I.

(b) *New York & Cuba Mail SS. Co.* v. *United States*, 16 Fed. 2d, 945, C. C. A. 2d Circuit, January 10, 1927, where the owner of the S. S. Esperanza, in collision with the United States destroyer Conner, brought a libel under a special Act passed nine months later and identical in form in all material respects with the Act in the present case. (See Appendix A to this brief.) In the District Court, 300 Fed. 827, nothing was said as to interest. On appeal the Circuit Court of Appeals of the Second Circuit held that the owner of the Esperanza was entitled to interest, and modified the decree of the District Court by awarding interest on the claim of the owner of the Esperanza, saying (p. 947):

"By the authority of the statute, the appellee may maintain its libel, as it would between private parties. In a suit between private parties in admiralty growing out of collision, it has long been settled that interest is awarded as part of the measure of damages. The object of the award of damages is to place the injured party in the same pecuniary position as he would have been in but for the collision.

"This principle has been referred to in admiralty as that of the right to a full and complete indemnity. The phrase 'the legal damages . . . found to be due . . . upon the same principles and measure of liability, as in like cases in admiralty between private parties' when given the interpretation intended by Congress in this enactment, included an award of interest, as is allowed in the case of a litigation between private parties in admiralty. The United States is not liable to pay interest in the absence of a statutory provision to that effect, except where it has contracted to pay it, or where the United States submits itself to the jurisdiction of the Court, or if sued, places itself in the position of a private party. *United States* v. *Thekla*, 266 U. S. 340, 45 S. Ct. 112, 69 L. Ed. 313. Inter-

est may be provided for by the name of legal damages. Congress has done so in granting this relief to private parties, where a vessel has been injured in collision with a public vessel. We must give to the language employed its ordinary and accepted meaning. We must presume that Congress intended that the principle of restitutio in integrum should be applied, as it is in cases in admiralty of like nature between private parties. *Paquete Habana*, 189 U. S. 453; *Nuestra Senora de Regla*, 108 U. S. 92. . . .

"The present Act of Congress, upon which this libel is maintainable, provides for the jurisdiction, adjudication of conflicting claims of the government and a citizen, and requires such adjudication including the measure of damages, to be made in the same legal method as private controversies are adjudicated. The intention of Congress is clear and explicit to grant full indemnity in the award against the United States, if any is made. Indemnity is not complete without interest. The Admiralty Courts in suits against private persons have always followed this rule. We think Congress intended that it should be followed in this instance."

(c) *Texas Company* v. *United States*, 16 Fed. 2d, 948, C. C. A. 2d Circuit, January 10, 1927, where a suit was brought by the owner of the steamship Texas under and by authority of a special Act of Congress identical in all material parts with the Enabling Act in the present case and approved six months prior thereto. (See Appendix B of this brief.) The District Court awarded interest to the owner of the Texas, 11 Fed. 2d, 981, holding that whether the United States claims interest or not is immaterial. This decree was affirmed by the Circuit Court of Appeals of the Second Circuit (16 Fed. 2d, 948).

In the *Texas Company* case as in the present case, no libel was filed by the United States.

In the *New York & Cuba Mail SS. Co.* and the *Texas Co.* cases the petitions of the United States of America for writ of certiorari were denied. (47 Supreme Court Reporter, 765.)

The Act in the present case is the same as the Acts in the *New York & Cuba Mail SS. Co.* and the *Texas Co.* cases. They

were all passed contemporaneously, and the same reasons for allowing interest apply to the suits brought thereunder.

It is not necessary that the word "interest" appear in the Act to authorize its allowance.

In *United States ex rel. Angarica* v. *Bayard*, 127 U. S. 251, it was expressly noted (p. 260) that interest is recoverable against the government where the Act included it "*either* by the name of interest *or by that of damages*". In the Enabling Act in the present case there was no necessity for Congress to insert the phrase "including interest" when it provided for the entry of a decree for the amount of "the legal damages . . . found to be due . . . upon the same principles and measure of liability with costs, as in like cases in admiralty between private parties" inasmuch as in such a case in admiralty between private parties interest so called is awarded as a component part of the damages.

This position is in accord with the construction placed on other statutes where no specific reference is made to interest.

Miller v. *Robertson*, 266 U. S. 243, Sec. 9 (Trading with Enemy Act, c. 106, 40 Stat. 411, 419).

Banco Mexicano v. *Deutsche Bank*, 263 U. S. 591, 603 (holding suit under above Act to be against United States of America).

Standard Oil Co. v. *United States*, 267 U. S. 76 (suit in admiralty under Act of Sept. 2, 1914, c. 293, Sec. 5, 38 Stat. 711, 712, to recover Government insurance).

Seaboard Air Line Ry. Co. v. *United States*, 261 U. S. 299 (Lever Act, Sec. 10, c. 53, 40 Stat. 276, 279).

United States v. *Rogers*, 255 U. S. 163 (Land Taking Act of Aug. 1, 1888, c. 728, 25 Stat. 357).

Hull No. 5 C. G. T. v. *United States*, 1927 A. M. C. 485 (Requisition Act).

See also Sec. 1117 of Title XI of the Revenue Act of 1926.

A special Act containing language strikingly similar to the present Act was construed in

United States v. *McKee et al.*, 91 U. S. 442,

where by the Act of June 8, 1972, the claim of the heirs of Colonel Francis Vigo, for money and supplies furnished the troops under command of General George Rogers Clarke in the year 1778, during the Revolutionary War, was referred to the Court of Claims

> " . . . with full jurisdiction to adjust and settle the same; and, in making such adjustment and settlement, the said court shall be governed by the rules and regulations heretofore adopted by the United States in the settlement of like cases. . . ."

Although this Act makes no reference to interest, it was held properly allowed.

It requires no straining of the language of the Enabling Act to construe it as authorizing the allowance of interest, upon applying the cardinal canon of statutory construction that

> "it is the duty of the court to give effect, if possible, to every clause and word of a statute". (*Montclair* v. *Ramsdell*, 107 U. S. 147, 152.)

The Act is entitled: "An Act for the *relief* of the owner of the steam lighter Cornelia." The general purpose of Congress in authorizing this suit was, therefore, to give "relief" to the appellant, and its phraseology should be so construed as to effectuate this general purpose.

> *Porto Rico Railway, Light & Power Co.* v. *Mor*, 253 U. S. 345, 348.
>
> *Glover* v. *United States*, 164 U. S. 294,

in which latter case Mr. Justice White says (p. 297):

> "In interpreting the Act, therefore, we must be guided not by any mere technicality, but must read its provisions by the light of the cardinal rule, commanding that the words must be apprehended, not in a forced and purely technical way, but in their general acceptation, and that *the law must be interpreted in accordance with its spirit so as to effectuate the purpose intended to be accomplished thereby*. *Mallard* v. *Lawrence*, 16 How. 251; *Smythe* v. *Fiske*, 23 Wall. 374." (Italics ours.)

The Act authorizes the submission of the "*claim* of the Boston Sand & Gravel Company to the District Court". The claim includes interest. The court is given jurisdiction "to enter a judgment or decree for the amount of the *legal damages*", which words had a judicially settled meaning at the time this Act was passed. In admiralty "legal damages" included interest as a part thereof and it must be presumed that the words were used in that sense by Congress.

United States v. *Merriam*, 263 U. S. 179, 187.

Had Congress intended that interest should not be included "it would have been easy to have said so" (*Tiger* v. *Western Investment Co.*, 221 U. S. 286, 308), as it did relative to actions in the Court of Claims (Judicial Code, Sec. 177) (U. S. Comp. Stat. 1916, Sec. 1168).

Finally, the Act authorizes the entry of a decree for the amount of the legal damages

> "*upon the same principle and measure of liability with costs as in like cases in admiralty between private parties*".

We submit that there is no ambiguity in this language. By authorizing the submission of the claim to the District Court "under and in compliance with the rules of said court sitting as a court of admiralty" Congress indicated the practice under which the proceedings should be regulated. When it continued and provided that the amount of the damages should be computed "upon the same principle and measure of liability with costs as in like cases in admiralty between private parties", Congress clearly indicated its intention that as to the amount of damages awarded to the appellant, including interest, the United States should be in no more favorable position than a private litigant.

We submit, therefore, inasmuch as the Enabling Act gives *relief*, allows a *claim*, which includes interest, to be sued for and determined according to the principles and measure of liability obtaining in suits between private parties, in which latter suits the courts have the power to award interest in the proper exercise of their discretion, that the court in the present case should be construed to have the same power in order to effect

the declared and apparent purpose of the Act and render justice to your petitioner.

CONCLUSION.

The petitioner therefore respectfully submits that the petition should be granted and a Writ of Certiorari issue as prayed for in said petition.

Respectfully submitted,

FOYE M. MURPHY,

Counsel for Petitioner.

APPENDIX "A".

42 Stat. 1778.

An Act for the relief of the owners of the steamship Esperanza.

Private, No. 192, 67th Congress.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the claim of the New York and Cuba Mail Steamship Company, owner of the American Steamship Esperanza, against the United States for damages alleged to have been caused by collision between said vessel and the United States destroyer Conner on the 15th day of February, 1918, off Barnegat Light, New Jersey, may be sued for by the owner of the said American steamship Esperanza in the United States District Court for the Southern District of New York, sitting as a Court of Admiralty, and acting under the rules governing such court, and said court shall have jurisdiction to hear and determine such suit and to enter judgment or decree for the amount of such damages and costs, if any, as shall be found to be due against the United States in favor of the owner of the said American steamship Esperanza, or against the owner of the said American steamship Esperanza, in favor of the United States, upon the same principles and measures of liability as in like cases in admiralty between private parties, and with the same rights of appeal: *Provided,* that such notice of the suit shall be given to the Attorney General of the United States as may be provided by order of the said court, and it shall be the duty of the Attorney General to cause the United States attorney in such district to appear and defend for the United States: *Provided further,* that said suit shall be brought and commenced within four months of the date of the passage of this Act.

Approved, February 28, 1923.

APPENDIX "B".

42 Stat. 1569.

An Act authorizing the owners of the steamship Texas to bring suit against the United States of America.

Private, No. 9, 67th Congress.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the claim of the owners of the steamer Texas arising out of a collision between said steamer and the United States steamer Frederick der Grosse, off Tompkinsville, Staten Island, in the harbor of New York, on the 3d day of September, 1917, for and on account of the losses alleged to have been suffered in said collision by the owners of said steamer Texas by reason of damages to and detention of said steamer may be submitted to the United States District Court for the Southern District of New York, under and in compliance with the rules of said court sitting as a Court of Admiralty; and that the said court shall have jurisdiction to hear and determine the whole controversy and to enter judgment or decree for the amount of the legal damages sustained by reason of said collision, if any shall be found to be due either for or against the United States, upon the same principle and measure of liability, with costs, as in like cases in admiralty between private parties, with the same rights of appeal: *Provided*, that such notice of the suit shall be given to the Attorney General of the United States as may be provided by order of the said court, and it shall be the duty of the Attorney General to cause the United States attorney in such district to appear and defend for the United States: *Provided further*, that said suit shall be brought and commenced within four months of the date of the passage of this Act.

Approved, November 17, 1921.

FILED
FEB 16 1928
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927.

No. 15

BOSTON SAND & GRAVEL COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR THE PETITIONER.

JOHN W. DAVIS,
FOYE M. MURPHY,
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927

No. 551.

BOSTON SAND & GRAVEL COMPANY,
PETITIONER,
v.
UNITED STATES OF AMERICA,
RESPONDENT.

BRIEF FOR THE PETITIONER.

OPINION OF THE COURT BELOW

The opinion of the Circuit Court of Appeals for the First Circuit is reported at 19 Fed. (2d) 744, and also at page 47 of the record. This is the only opinion dealing with the question at issue on this review. The ruling of the trial judge on that question is to be found at page 37 of the record.

JURISDICTION

The present writ was granted presumably to resolve a conflict of the Circuit Courts of Appeals on an important issue of law. The decision below is also in conflict with the opinion of this court in *United States ex rel. Angarica* v. *Bayard*, 127 U. S. 251.

The present case was preceded by two decisions of the Circuit Court of Appeals for the Second Circuit, *New York and Cuba Mail Steamship Company* v. *United States*, 16 Fed. (2d) 945, and *Texas Company* v. *United States*, 16 Fed. (2d) 948, in which decisions results contrary to that in the present case

were reached under private acts of Congress which were, *mutatis mutandis*, identical with the act involved in the present case. The Government's petitions for writs of certiorari were denied in those cases on May 31, 1927 (R., pp. 58–60). The present case was decided by the Circuit Court of Appeals for the First Circuit on June 4, 1927, and the writ herein granted November 21, 1927 (R., p. 61).

STATEMENT OF THE CASE

On August 9, 1918, the steam lighter Cornelia, owned and operated by your petitioner, while proceeding outbound from the port of Boston through Broad Sound channel was in collision with the United States destroyer Bell, as a result of which collision the Cornelia was ripped open, beached and became a total loss.

By virtue of a special Act of Congress, approved May 15, 1922, *infra* page 3 (R., p. 47), your petitioner on May 29, 1922, brought a libel in the United States District Court for the District of Massachusetts against the United States of America to recover damages arising out of said collision. In said district court the Cornelia was held solely at fault and the libel was dismissed (298 Fed. Rep. 768). Upon appeal, the Circuit Court of Appeals for the First Circuit held both vessels at fault (7 Fed. Rep. 2d, 278) and a mandate issued to the district court, reversing the final decree of said court and directing further proceedings not inconsistent with the opinion. A commissioner thereupon found (R., pp. 8–34) total damages for the libellant (no claim of damage being made by the respondent) in the amount of $91,084.68, and your petitioner was awarded one-half of this amount, *i. e.*, $45,542.34, which findings were confirmed by the district court (R., pp. 39–43) (16 Fed. Rep. 2d, 643) and sustained on appeal to the Circuit Court of Appeals for the First Circuit (unreported).

Following the usual practice in said circuit, the commissioner made no finding as to interest, but reported the data from which interest could be computed. Thereupon your petitioner filed a motion seeking interest upon the various amounts of damages as found by the commissioner (R., p. 37). The motion was disallowed (R., p. 37), not by reason of the exercise of discretion by the court, but solely on the ground of

lack of power in the court "on the authority of *Nantasket Beach Steamboat Company* v. *United States*, 297 Fed. 656", wherein the same judge (Brewster) at page 658 had said:

> "If I regard the matter as one of discretion only, I should feel disposed to award interest, but in the absence of special circumstances, I am not inclined to disagree with Judge Hale [in *Pennell* v. *United States*, 162 Fed. 75]."

The *Pennell* case, as will be shown, rested on a mistaken application of a precedent to facts totally different from that in the case in which the precedent had been established.

The decree of the District Court in accordance with this ruling omitted interest (R., pp. 37, 38). Appeal was duly claimed, and the Circuit Court of Appeals for the First Circuit on June 4, 1927, disallowed interest (19 Fed. Rep. 2d, 744; 1927 A. M. C. 1239, R., p. 47) and later denied libellant's petition for a rehearing upon the question of its allowance (R., p. 60). The owner of the Cornelia thereupon filed its petition for the writ of certiorari upon which the case is now here for review.

THE QUESTION PRESENTED

The sole question presented on this appeal is whether the petitioner is entitled to recover interest as a part of its damages in a suit in admiralty in the United States District Court brought under the authority of the following special act of Congress:

> "(Private—No. 67—67th Congress.)
> (S. 1814)
>
> "An Act for the relief of the owner of the steam lighter Cornelia.
>
> "Be it enacted by the Senate and House of Representatives of the Unites States of America in Congress assembled, That the claim of the owner of the steam lighter Cornelia rising out of a collision between said steam lighter and the United States destroyer Bell in Broad Sound, Boston Harbor, Massachusetts, on the 9th day of August, 1918, for and on account of the losses alleged to have been suffered in said collision by the owner of said steam lighter Cornelia by reason of damages to or the loss of said steam

lighter, her boats, engines, boilers, tackle, apparel, furniture, and supplies, may be submitted to the United States Court for the District of Massachusetts, under and in compliance with the rules of said court sitting as a court of admiralty; and that the said court shall have jurisdiction to hear and determine the whole controversy and to enter a judgment or decree for the amount of the legal damages sustained by reason of said collision, if any shall be found to be due either for or against the United States, upon the same principle and measure of liability with costs in like cases in admiralty between private parties with the same rights of appeal: Provided, That such notice of the suit shall be given to the Attorney General of the United States as may be provided by order of the said court, and it shall be the duty of the Attorney General to cause the United States attorney in such district to appear and defend for the United States: Provided further, That said suit shall be brought, and commenced within four months of the date of the passage of this Act.

"Approved May 15, 1922."

POINT I

THE WORD "DAMAGES" IN AN ENABLING ACT IS SUFFICIENT TO GIVE TO THE CLAIMANT INTEREST AGAINST THE GOVERNMENT, WHENEVER INTEREST WOULD BE ALLOWED AS DAMAGES IN LIKE CIRCUMSTANCES BETWEEN PRIVATE PERSONS.

In *United States ex rel Angarica v. Bayard*, 127 U. S. 251, this Court, in denying interest to the claimant therein, stated the law applicable to situations such as that now before this Court. It said at page 260:

> "The case, therefore, falls within the well-settled principle, that the United States are not liable to pay interest on claims against them, in the absence of express statutory provision to that effect. It has been established, as a general rule, in the practice of the government, that interest is not allowed on claims against it, *whether such claims originate in contract or in tort*, and whether they arise in

the ordinary business of administration or under private acts of relief, passed by Congress on special application. *The only recognized exceptions are, where the government stipulates to pay interest and where interest is given expressly by an act of Congress, either by the name of interest or by that of damages.*

"This appears from a succession of the opinions of the Attorneys General of the United States, given by Attorneys General Wirt, Crittenden, Legare, Nelson, Johnson Cushing and Black, and appearing in the following volumes any pages of those opinions, as published: 1, 268; 1, 550; 1, 554; 3, 635; 4, 14; 4, 136; 4, 286; 5, 105; 7, 523; 9, 57; and 9, 449." (Italics ours.)

Petitioner contends that the private act here under consideration is one "where interest is given expressly by an act of Congress . . . by the name . . . of damages".

It is obvious from the foregoing excerpt from the *Angarica* opinion that the statement of the law contained therein was intended to comprehend the prior practice of the Government as expounded in the opinions of the Attorneys General there referred to.

Examination of these opinions shows that that of Attorney General Cushing reported in 7 Op. A. G. 523, is the most pertinent to the stated exception to the general rule. That exception is in the exact words of the syllabus to this Cushing opinion. The inference seems, therefore, inescapable that the words were used by this Court in the same sense as that in which they were used by the Attorney General. Their meaning was not further expounded in this Court's opinion in the *Angarica* case, but in the body of the Cushing opinion, their meaning is explained as follows:

"There is another possible case of apparent, but not real, exception, if the case exists, and that is, of 'damages' provided by statute to be assessed against the Government. In one of the general acts above cited, a statute interest on the detention of money is the established rendering of the term 'damages'. (I Stat. at Large, p. 85.) *If, therefore, any such case of claim on the Government can be shown,* [illegible]

40.)

with color of demand for interest as 'damages', it will be no departure from the rule never to allow interest except on express requirement of statute." (Italics ours.)

That is to say, the word "damages" in a private enabling statute will be sufficient to give to a claimant the right to interest against the Government whenever interest would be allowed as damages in like circumstances if the claim had arisen between private parties. If, then, petitioner can show that interest in collision cases in admiralty is awarded as an element of damages, it is submitted that the presence of the words "legal damages" in the statute is, apart from the other reasons considered below, sufficient to conclude this case in favor of the petitioner.

POINT II.

INTEREST AS AWARDED IN COLLISION CASES IN ADMIRALTY BETWEEN PRIVATE PARTIES IS DAMAGES WITHIN THE PROPER LEGAL MEANING OF THAT TERM

Whether an award of interest is *as* damages or not depends on just one question—whether or not the interest has been stipulated for between the parties. If the interest has been stipulated for, it is part of the substantive obligation; if it has not, it is remedial in character—that is, it is damages.

Thus Sedgwick in his work on Damages (9th Edition) at pages 552-3 says:

> "Interest is the value of the use of money; the amount of compensation for withholding money. It bears the same relation to money that rent does to land, wages to labor, and hire to a chattel. It may be secured by an agreement, or it may be allowed as damages; in the former case the rate is usually stipulated in the agreement, in the latter it is usually fixed by legislation. It is not necessary, however, that the amount should be fixed by statute; for in the absence of a statute rate, the court will admit proof of the current rate, and will allow interest as damages at that rate.
>
> "Where interest is secured by an agreement it is given

by the court, not by way of damages, but as a substantive part of the debt; the consideration of this branch of the subject, therefore, does not come within the scope of this treatise. But in all cases where damages are claimed for the wrongful detention of money the allowance of interest is governed by the law of compensation, and, therefore, will be treated here."

Sutherland in his work on the same subject (4th Edition) is in accord:

"When expressly stipulated for to accrue during the period of forbearance it [interest] becomes, as it accrues, a positive addition to the principal and is thence a distinct and integral part of the debt, payable, unless otherwise agreed, when the principal is due, and in the same funds. As such it has a substantive character." (Page 936.)

"Interest is also recoverable for the detention of money after it is due. It is in many such cases recoverable of right and as a matter of law, independently of the discretion of a jury. It may also be claimed of right under various circumstances of contract and tort, on the value of property or things in action, and on the value of services, though such value has to be proved; on money lent, paid, had and received, as well as on divers other forms of loss to the plaintiff or gain to the defendant, capable of pecuniary estimate; and in such cases it is immaterial that there is no agreement for interest or forbearance. When the principal is due upon contract, of course the obligation or duty to pay interest for its detention results from the same contract and is recoverable thereon as damages for failure to perform; and when recoverable in tort it is chargeable on general principles as an additional element of damage for the purpose of full indemnity to the injured party." (Page 939.)

"In another class of cases, similar to those last mentioned, but where the right to interest is less obvious, and in some others where the injury cannot be measured by any precise pecuniary standard, interest is allowable under the advice of the court in the discretion of the jury." (Page 940.)

This distinction is widely supported in the cases. See, for example, *The Santa Maria*, 10 Wheat. 431, 445; *Williams* v. *American Bank*, 4 Metc. 317, 320; *Dana* v. *Fiedler*, 12 N. Y. 40; *Parrott* v. *Knickerbocker Ice Co*., 46 N. Y. 361.

It seems perfectly clear that this same distinction between interest as a part of the substantive right and interest by way of remedy is the distinction that this Court had in mind in the *Angarica* case. The opinion in that case speaks of the Government's stipulating to pay interest on the one hand and on the other of provision for interest by special act of Congress, either by the name of interest or by the name of damages. The first, clearly, is the case of interest paid as part of the substantive obligation and the latter, that of interest, paid by way of remedy.

Examples of tort cases in which Congress has omitted to provide for interest "expressly . . . either by the name of interest or by that of damages" are to be found among the opinions of the Attorneys General cited by this court in the *Angarica* case. Thus, for example, in the statute involved in the opinion of Attorney General Crittenden, 3 Op. A. G. 635, the court was authorized "to receive and examine and adjudge all cases of claims for losses occasioned by the troops" in the service of the United States in 1812 and 1813. Another example is the statute in *Watts* v. *United States*, 129 Fed. 222, fully set forth and discussed in this brief *infra* page 19.

In the present case, the statute after providing "that the claim . . . for . . . losses . . . may be submitted to the . . . court" goes on to provide "that the said court shall have jurisdiction . . . to enter a judgment or decree for the amount of the legal damages . . . upon the same principle and measure of liability with costs in like cases in admiralty between private parties . . ." If Congress intended nothing additional by the second provision of the statute just quoted, its mode of expression was certainly inexcusably redundant.

It is well settled American maritime law that in collision cases arising between private parties, interest is to be awarded as an element of damages.

The Umbria, 166 U. S. 404, 421;
The Scotland, 118 U. S. 507, 518;

The America, 1 Fed. Cas. No. 284;
The Rhode Island, 20 Fed. Cas. No. 11,740a;
Guibert v. *The British Ship, George Bell*, 3 Fed. 581, 588;
Fabre v. *Cunard S. S. Co.*, 53 Fed. 288, 293;
The Rabboni, 53 Fed. 952, 957;
The Reno, 134 Fed. 555, 556;
In re Great Lakes Dredge & Dock Co., 250 Fed. 916, 917; 256 Fed. 497, 505;
New York & Cuba Mail S. S. Co. v. *United States*, 16, Fed. (2d) 945;

The rule is the same in England.

The Dundee (1827) 2 Haggard, 137;
The Hebe (1847) 2 W. Robinson, 530;
The Kate [1899] Prob. Div. 165;
The Kong Magnus [1891], Prob. Div. 223.

Roscoe in his work on Damages in Maritime Collisions (2d Ed.) at page 5 discusses the general principle of compensation applicable in collision cases:

"The object of the award of damages arising out of a collision is to place the owner of the lost or injured ship as nearly as may be in the same pecuniary position as he would have been in but for the collision. In a series of judgments in the Admiralty Court this principle has been called that of *restitutio in integrum*—'the right to a full and complete indemnity'—and this is therefore the measure or standard of damages which are recoverable by the owner of a ship which has been injured in a collision by a wrongful act on the part of another person."

And at page 39 he points out that:

"If a vessel is totally lost when in ballast her owner is entitled to receive interest from the date of the collision to the date of payment on the sum awarded to him."

In *The Kong Magnus*, *supra*, Sir Charles Butt, in his opinion, says:

"It seems clear that a different rule exists in collision

> suits in the Admiralty divisions, and existed in the Court to which it has succeeded, to that which prevails in a common law court as to including interest in the damages. A Court of Common Law does not include interest in the damages assessed, because, as I understand it, until a man knows what amount of the principal liability he would have to discharge, he could not know and pay into Court the amount of interest, and, therefore, was not in any default. On the other hand I presume the view of the Court of Admiralty has been that the person liable in damages, having kept the sum which ought to have been paid to the claimant, and having therefore been able to receive interest upon it, ought to be held to have received it for the person to whom the principal was payable."

The Government has attempted, and will, no doubt, again attempt, to escape the rule stated by this Court in the *Angarica* case by contending that interest in collision cases in admiralty cannot be "damages" because in collision cases refusal of interest to the successful libellant lies within the discretion of the admiralty court. There undoubtedly are rare cases which recognize that there is an element of discretion in the allowance of interest in collision cases. Examples are *The Scotland*, 118 U. S. 507, 518; *The Albert Dumois*, 177 U. S. 240, 255; *The Maggie J. Smith*, 123 U. S. 349, 356.

But this discretion belongs to the admiralty court only because

> "Such courts in the exercise of their jurisdiction are not governed by the strict rules of the common law but act upon enlarged principles of equity."

Story, J., in *The Virgin*, 8 Pet. 538, 549.

The existence of this judicial discretion as to the refusal of interest does not mean that the owner of an injured vessel has no right to interest as a part of his recovery. Quite the contrary; the discretion has so uniformly been exercised to allow interest that its allowance has become practically a rule of law in the absence of a showing of some extraordinary circumstance making it inequitable to allow it. But two circumstances are recognized as justifying the refusal of interest—laches

in bringing suit and vexatious appeals. *Benedict on Admiralty* (5th Ed.) p. 495; *Roscoe on Damages in Maritime Collisions* (2d Ed.) p. 41.

Admiralty courts continually refer to the allowance of interest as the usual rule. Thus *In re Great Lakes Dredge & Dock Co.*, 250 Fed. 916 (D. C. Mass. 1917), Judge Morton said (page 917):

> "It is a pure question of law whether interest should or should not be allowed. The case presents, so far as I can see, no special circumstances affecting the matter either way. The general rule should be ascertained and applied."

He then quoted with approval the following language of Wood, V. C., in *Straker* v. *Hartland*, 2 H. & M. 570, 575:

> "Then I find that the settled law of the court of admiralty is that interest is as much payable in cases of collision as if there had been a contract to pay interest, and that the damages are there held to be due at the date of the collision, and that interest is given from that time."

And that of Mr. Justice Holmes in *Frazer* v. *Bigelow Carpet Co.*, 141 Mass. 126:

> "Interest is allowed in the admiralty upon damages for collision, and other courts have adopted the admiralty doctrine." (Citing authorities.)

In *Managua Navigation Co.* v. *Aktieselskabet Borgestad*, 7 Fed. (2d) 990, 993, the Circuit Court of Appeals said:

> "The general rule is to allow interest from the date of the collision. *The Manitoba*, 122 U. S. 97, 7 S. Ct. 1158, 30 L. Ed. 1095; *Galveston Towing Co.* v. *Cuban S. S. Co.*, 195 F. 711, 115 C. C. A. 438; *The El Monte*, 252 Fed. 59, 164 C. C. A. 171. Nothing in this case appears to justify an exception to the general rule, and the decree would fall short of idemnifying the owner of the Borgestad for the loss it sustained, if interest is not allowed on the amount of such loss from the time it was actually sustained."

In *The America*, 1 Fed. Cas. No. 284, it was held:

> "Where the value of the thing lost or the cost of repairs and the like, are the test or measure of recovery, and the amount of damages become mere matter of computation, interest is as necessary to indemnity as the allowance of the principal sums."

See also *The J. J. Gilchrist*, 173 Fed. 666, 672; *New York & Cuba Mail S. S. Co.* v. *United States*, 16 Fed. (2d) 945, 947; and other cases cited *supra*, page 9.

This Court, speaking through Mr. Justice Brown, in *The Umbria*, 166 U. S. 404, also recognized that allowance of interest is the usual rule, stating, page 421:

> "There is nothing in the peculiar facts of the case to take it out of *the general rule* that in case of total loss by collision *damages* are limited to the value of the vessel, *with interest thereon*, and the net freight pending at the time of collision." (Italics ours.)

The foregoing cases demonstrate that the judicially settled meaning of the word "damages" when used in reference to admiralty collision cases includes interest and it is settled beyond all cavil that where a word has a judicially settled meaning, it must be presumed that Congress has used it in that sense where it appears in a statute.

> *The Abbotsford*, 98 U. S. 440, 444;
> *Kepner* v. *United States*, 195 U. S. 100, 124;
> *United States* v. *Merriam*, 263 U. S. 179, 187.

But that interest in collision cases in admiralty is "damages" within the meaning of the rule of the *Angarica* case is also clear from the language of the rule itself. It is obvious that this court intended the rule it was stating to apply to *some* tort cases. The opinion speaks of claims against the Government, "whether such claims originate in contract or in tort." Yet if the argument of the Government in the present case be sustained and the rule of the *Angarica* case be held inapplicable to *maritime* torts because the admiralty court has discretion in extreme cases to deny interest, then the rule of that case cannot logically be applied to *any* tort case, for under the

decisions of this court the jury in non-maritime tort cases is possessed of the same discretion.

Lincoln v. *Claflin*, 7 Wall. 132, 139;
District of Columbia v. *Robinson*, 180 U. S. 92, 107;
Drumm Floto Commission Company v. *Edmisson*, 208 U. S. 534, 539.

Since discretion exists in reference to the disallowance of interest in all tort cases, whether maritime or non maritime, it must be clear that the existence of this discretionary power is totally irrelevant to the application of the rule of the *Angarica* case, for that rule *by its very terms* is made expressly applicable to some, if not all, tort cases.

POINT III.

IF THE USE OF THE WORD "DAMAGES" IN THE ENABLING ACT HERE IN QUESTION LEAVES ANY DOUBT AS TO THE INTENTION OF CONGRESS, THE OTHER PROVISIONS OF THE STATUTE CERTAINLY SET SUCH DOUBT AT REST.

In view of the judicially settled meaning of the word "damages" in admiralty collision cases, petitioner submits that the provision for "damages" in the statute in question should conclude this case in petitioner's favor; but if doubt be possible, certainly that doubt is resolved by the explicit provision that the "legal damages" shall be awarded

> "upon the same principle and measure of liability with costs in like cases between private parties".

As early as 1819 the governmental practice was to allow interest whenever Congress in an enabling act referred

> "to any principles of settlement from which it can be inferred that interest was intended to be allowed".
>
> Attorney General Wirt, 1 Op. A. G. 268.

Surely the above quoted excerpt from the statute here in question constitutes such a reference.

This court recognized this method of providing for the allowance of interest in *United States* v. *McKee et al.*, 91 U. S. 442.

In that case a private act authorized the Court of Claims to hear a certain claim

> ". . . with full jurisdiction to adjust and settle the same; and, in making such adjustment and settlement, the said court shall be governed by the rules and regulations heretofore adopted by the United States in the settlement of like cases. . . ."

Although the act contained no reference to interest, this Court approved its allowance.

The provision in the present act for costs to the successful party still further fortifies the conclusion that full restitution was intended. There is no right to costs even as against an individual in the absence of statute.

> *Coggill* v. *Laurence*, Fed. Cas. No. 2957, 2 Blatchf. 304.
> *Kneass* v. *Schuylkill Bk.*, Fed. Cas. No. 7876, 4 Wash. 106.
> *O'Neill* v. *Kansas City, etc. R. R. Co.*, 31 Fed. 663.
> *Telsa Electric Co.* v. *Scott*, 101 Fed. 524.
> *Bone* v. *Construction Co.*, 235 Fed. 901.

A fortiori there is no such right as against the Government in the absence of statute.

> *United States* v. *Boyd*, 5 How. 29, 51.
> *United States* v. *Verdier*, 164 U. S. 213, 219.

There are many other cases. Costs are ordinarily an unimportant item. Interest, on the other hand, is usually essential to a full indemnity. Can it be supposed that Congress gave this trifle yet withheld what is essential to a just and full reparation?

There is no room for the application of the maxim *Expressio unius est exclusio alterius*, for costs are not "damages" and so if they are to be given, they must be given separately and *suo nomine*. *The Wanata*, 95 U. S. 600, 615.

The proctor for the Government in the court below sought to raise doubt as to the intention of Congress by referring to a very brief colloquy in the Senate *occurring some four years after the passage of the act here in question*. Strange to say, the court below relied on this colloquy in its opinion. The discus-

sion referred to certain other private relief acts from the text of which provision for the allowance of interest had been stricken out in committee. The colloquy can be quoted *in extenso* without undue extension of this brief:

> "Mr. King: Do I understand that the interest provision has been stricken out of the bills which have just been passed, so that the judgments will not bear interest?
>
> "Mr. Copeland: Yes, the words 'including interest' were stricken out of the bills." *Congressional Record*, 69th Congress, First Session, page 3753.

In *United States* v. *Trans Missouri Freight Ass'n*, 166 U. S. 290, this Court said (p. 318):

> "There is, too, a general acquiescence in the doctrine that debates in Congress are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body.
>
> "The reason is that it is impossible to determine with certainty what construction was put upon an act by the members of a legislative body that passed it by resorting to the speeches of individual members thereof. Those who did not speak may not have agreed with those who did; and those who spoke might differ from each other; the result being that the only proper way to construe a legislative act is from the language used in the act, and, upon occasion, by a resort to the history of the times when it was passed."

In *Mitchell* v. *Great Works Milling & Manufacturing Co.*, 17 Fed. Cas. No. 9662, Judge Story said (p. 498):

> "What passes in Congress upon the discussion of a bill can hardly become a matter of strict judicial inquiry; and if it were, it could scarcely be affirmed, that the opinions of a few members, expressed either way, are to be considered as the judgment of the whole house, or even of a majority. But, in truth, little reliance can or ought to be placed upon such sources of interpretation of a statute. The questions cannot be, and rarely are, there debated upon strictly legal grounds, with a full mastery of the sub-

> ject and of the just rules of interpretation. The arguments are generally of a mixed character, addressed by way of objection, or of support, rather with a view to carry or defeat a bill, than with the strictness of a judicial decision. . . . But in truth, courts of justice are not at liberty to look at considerations of this sort. We are bound to interpret the act as we find it, and to make such an interpretation as its language and its apparent objects require. We must take it to be true, that the legislature intend precisely what they say, and to the extent which the provisions of the act require, for the purpose of securing their just operation and effect. Any other course would deliver over the court to interminable doubts and difficulties, and we should be compelled to guess what was the law from the loose commentaries of different debates instead of the precise enactments of the statute."

See also *Duplex Co.* v. *Deering*, 254 U. S. 443, 474; *Omaha & C. B. St. R. Co* v. *I. C. C.*, 230 U. S. 324; *Aldridge* v. *Williams*, 3 How. 1, 24; *United States* v. *Union Pac. R. R. Co.*, 91 U. S. 72, 79. The rule is the same though the statements be those of the Congressman in charge of the bill.

> *Banco Mexicano* v. *Deutsche Bank*, 263 U. S. 591, 602; *Mutual Benefit Life Ins. Co.* v. *Duffy*, 295 Fed. 881.

The Government has sought to becloud the meaning of words clear and unambiguous in their ordinary and accepted meaning by citing the statement of one only out of ninety-six senators and the statement cited is one *made four years after the passage of the act here involved in reference to an entirely different act.* That cannot be done.

> *Pennsylvania Mutual Co.* v. *Lederer*, 252 U. S. 523, 537.

But even if the cited senatorial statement were relevant, it would still be equivocal. In special acts Congress has sometimes allowed interest, sometimes denied it, sometimes ignored it. No set policy can be discerned.

Out of the ninety-six special acts passed since 1912 when

they began to appear commonly, comparable in phraseology to that here in question, four include interest *co nomine*.

43 Stat. 1369, Colonial Navigation Co. (SS. Lexington) 1924.

43 Stat. 1374, Thompson-Lache Boat Co. (SS. Floyd) 1924.

43 Stat. 1589, Mallory SS. Co. (SS. Nueces) 1925.

44 Stat. 1839, William J. Donaldson (The Theresa) 1927.

Eight explicitly exclude it and eighty-four make no mention of it *co nomine*. It is easy for Congress to say so, if it is its intention to exclude it. *Tiger* v. *Western Investment Co.*, 221 U. S. 286, 311.

In other cases the merits have been considered, damages determined by the Committee and a stated sum has been reported out and voted by Congress directly as relief, sometimes with interest, *e. g.*, American Trans. Co. (SS. A. A. Raven) 44 Stat. 1605, and Senate Report No. 995 of the 69th Congress.

The *Suits in Admiralty Act*, March 9, 1920, 41 Stat. 525, provides for interest at 4%—by judicial construction, from the date of the collision. *Middleton* v. *United States*, 286 Fed. 548, 554. But in *Comus* v. *Lake Frampton*, 1927 A. M. C. 1713, a libel brought under this Act, an owner was allowed by the Circuit Court of Appeals for the Second Circuit 6% interest against the United States under the court's broad equity power because the Government in a cross-libel was recovering under the usual rule 6% per annum as a part of its own damages.

It must be clear that what Congress has done in one case is no guide to what it intends in another. The fact is there is no ambiguity in the present case in the act itself if the judicially settled meanings of the words used are given effect. This absurd attempt to create ambiguity by imputing into the case this belated and equivocal senatorial colloquy, concerning an entirely different act, is the best indication of the extremity of the Government's case.

The fact is that the conflict between the First and Second Circuits is the outgrowth of a mistaken application in the First Circuit of a precedent from the Second Circuit—a precedent

that arose out of a totally different state of facts. The conflict of the circuits is discussed in detail in the remaining section of this brief.

POINT IV.

THE WEIGHT OF AUTHORITY, DEALING WITH SIMILAR STATUTES, SUPPORTS THE PETITIONER AND NOT THE GOVERNMENT

The only live and relevant judicial precedents for the decision herein by the Circuit Court of Appeals for the First Circuit are *Pennell* v. *United States* (D. C. Maine), 162 Fed. 75, and *Nantasket Beach Steamboat Company* v. *United States* (D. C. Mass.), 297 Fed. 656.

It is true that in its brief below and in its applications for certiorari in *United States* v. *Texas Company*, No. 1055, October Term, 1926, and in *New York & Cuba Mail Steamship Company* v. *United States*, 1064 and 1065, October Term, 1926, and in *Commonwealth and Dominion Line, Ltd.*, v. *United States*, No. 630, October Term, 1927, the Government did cite three other cases as supporting its contention that interest should not be allowed under private acts such as that here in question. The three cases referred to are *Whitelaw* v. *United States*, 9 Fed. (2d) 103 (D. C. N. D. Calif.); *Watts* v. *United States* (S. D. N. Y.) 129 Fed. 222; *Nippon Yusen Kabushiki Kaisha* v. *United States* (E. D. N. Y.) 1926, A. M. C. 1008.

The *Whitelaw* case is pretty wide of the mark. That was an action brought under an act of Congress dated June 7, 1924, which conferred jurisdiction upon the District Court, but not, apparently, in admiralty,

> "to hear and determine the claims of American citizens . . . for damages or loss occasioned by or resulting from the seizure, detention, sale or interference with their voyage by the United States of vessels charged with unlawful sealing in the Behring Sea and water contiguous thereto and outside of the three mile limit during the years 1886 to 1896, inclusive, and to enter judgment therefor."

The evidence in that case was held to warrant measuring the damages of the claimant by the value of the probable catch

on the sealing voyage unlawfully interrupted by the Government. Plainly the damages were measured in a highly speculative fashion, and it would be strange, indeed, if interest had been awarded under those circumstances. As a matter of fact no claim for interest was submitted.

There was, moreover, nothing in that case to show that in such a situation interest was any proper part of the damages to be awarded. In the statute itself the meaning of the word "damages" is made doubtful by the fact that the word "loss" appears in apposition with it and there is no reference in the statute, as there is in the statute in the present case, to "any principles of settlement from which it can be inferred that interest was intended to be allowed". Plainly the *Whitelaw* case is not relevant to the question now before this Court.

The same is likewise true of the *Watts* case. The statute there in question provided:

> "The investigation of said claim shall be made upon the following basis: First, the said court shall find the facts attending the loss of the said steamship Foscolia and her cargo; and second, if it shall appear that the responsibility therefor rests with the United States steamship Columbia, the court shall then ascertain and determine the amounts which should be paid to the owners, respectively, of the Foscolia and her cargo, in order to reimburse them for the losses so sustained, and shall render a decree accordingly. Provided, further, that the amounts of the losses sustained by the master, officers, and crew of the Foscolia may be included in such decree."

In that statute there was obviously lacking any general authorization to the court to proceed as a court of admiralty and to assess damages according to its usual rules as between private parties. The directions for the assessment of the claim were very detailed; but all reference to interest was omitted as well as all reference to "any principles of settlement from which it can be inferred that interest was intended to be allowed". It should be noted, also, that the use of the technical term "damages" was avoided and the indefinite term "amounts of losses" was used in its stead. Given the most generous

construction, this statute, in view of the rule laid down in the *Angarica* case, could hardly have been construed to permit the allowance of interest. (See comparison in *The Commonwealth*, 297 Fed. 651 at 654.)

As to the *Nippon* case, that case was decided in the Eastern District of New York in 1926. The opinion in that case has never been reported. The statute involved was, however, in the respects important, identical with that here in question; yet interest was refused.

But the case had been overruled, at the time that the Circuit Court of Appeals for the First Circuit decided the present case, by two decisions of the Circuit Court of Appeals for the Second Circuit, to wit: *Texas Company* v. *United States*, 16 Fed. (2d) 945; *New York and Cuba Mail Steamship Company* v. *United States*, 16 Fed. (2d) 948.

In those cases the private acts were, *mutatis mutandis*, identical with the act in the present case. It was pointed out that interest was an element of the damages to be awarded as between private parties in collision cases in admiralty and since the private acts concerned provided for the assessment of "the legal damages . . . found to be due . . . upon the same principle and measure of liability, with costs, as in like cases in admiralty between private parties", the court held that the plain meaning of the acts was that the claimants should recover interest against the Government. The court also indicated that in its opinion the cases came within the law as set forth in this court in the *Angarica* case as involving statutes in which "interest is given expressly by an act of Congress by the name . . . of damages."

The court said at page 947:

> "By the authority of the statute, the appellee may maintain its libel, as it would between private parties. In a suit between private parties in admiralty growing out of collision, it has long been settled that interest is awarded as part of the measure of damages. The object of the award of damages is to place the injured party in the same pecuniary position as he would have been in but for the collision.

"This principle has been referred to in admiralty as that of the right to a full and complete indemnity. The phrase 'the legal damages . . . found to be due . . . upon the same principles and measure of liability, as in like cases in admiralty between private parties', when given the interpretation intended by Congress in this enactment, included an award of interest, as is allowed in the case of a litigation between private parties in admiralty. The United States is not liable to pay interest in the absence of a statutory provision to that effect, except where it has contracted to pay it, or where the United States submits itself to the jurisdiction of the Court, or if sued, places itself in the position of a private party. *United States* v. *Thekla*, 266 U. S. 328, 45 S. Ct. 112, 69 L. Ed. 313. Interest may be provided for by the name of legal damages. Congress has done so in granting this relief to private parties, where a vessel has been injured in collision with a public vessel. We must give to the language employed its ordinary and accepted meaning. We must presume that Congress intended that the principle of *restitutio in integrum* should be applied, as it is in cases in admiralty of like nature between private parties. *Paquete Habana*, 189 U. S. 453; *Nuesta Senora de Regla*, 108 U. S. 92. . . .

"The present Act of Congress, upon which this libel is maintainable, provides for the jurisdiction, adjudication of conflicting claims of the government and a citizen, and requires such adjudication including the measure of damages, to be made in the same legal method as private controversies are adjudicated. The intention of Congress is clear and explicit to grant *full indemnity* in the award against the United States, if any is made. Indemnity is not complete without interest. The Admiralty Courts in suits against private persons have always followed this rule. We think Congress intended that it should be followed in this instance." (Italics ours.)

These decisions of the Circuit Court of Appeals for the Second Circuit were preceded in that circuit by a decision to the same effect by Judge Mack (S. D. N. Y.) in *The Commonwealth*,

297 Fed. 651, and by *The Friedrich der Grosse*, 1926 A. M. C. 361. There was also *Alaska Commercial Co.* v. *United States*, 1925 A. M. C. 1269 in the Northern District of California in which interest was allowed without discussion. There is also the later decision of the Second Circuit Court of Appeals to the same effect in *Commonwealth & Dominion Line Ltd.* v. *United States*, 20 Fed. (2d) 729, now pending in this Court on writ of certiorari, granted presumably because of the pendency of the present case.

It is plain that the great weight of authority dealing with similar acts, supports the petitioner and not the Government. (The acts involved in the three cases from the Second Circuit Court of Appeals are printed in sequence in the appendix to this brief.) Even at the time of the decision of the First Circuit Court of Appeals in the present case there were two circuit court of appeals cases and three district court cases contrary to the rule it adopted in its decision. In support of its decision there were only the two cases originally referred to—the *Pennell* and *Nantasket* cases, decisions of district courts in the First Circuit.

The statute in the *Pennell* case was not identical with the statute here involved; it provided merely for suit against the Government, but it was sufficiently like it so that the result in the two cases should be identical. Thus, it provided:

> "that in regard to the trial or hearing of said cause, the same rules and modes of proceedings as to evidence, mode of trial, liability for damage, and measurement for damages, and otherwise including the right of appeal, shall apply as in other cases of admiralty between individual owners of colliding vessels, and shall also be determined upon such legal or equitable principles as shall be applicable thereto."

It is difficult to read this language without concluding that interest was recoverable thereunder, but the district judge in the *Pennell* case reached a contrary conclusion by a blind following of the *Watts* case, applying what was probably a correct decision in that case to a statute manifestly of quite different import. Confronted with the accumulation of forty-two years

of interest and not finding the word "interest" specifically in the statute, he brushed aside the provision of the act that "the same rules as to . . . liability for damages and measurement of damages . . . shall apply as in other cases of admiralty between private owners of colliding vessels", adopted the decision of the *Watts* case and disallowed interest. *Plainly this went beyond mere procedure* and it seems therefore clear that the *Pennell* case was incorrectly decided.

In the *Nantasket* case the statute differed in no material respect from the statute involved in the present case. Both the *Pennell* case and the decision of Judge Mack in *The Commonwealth*, already referred to, were urged upon the attention of the district judge. He quite rightly held that there was no distinction between the acts involved in the two cases but chose to follow the decision in the *Pennell* case. The *Watts* case on which the *Pennell* decision was based was not mentioned in the course of the opinion. In fact, in *The Commonwealth* Judge Mack had pointed out that the statutes in that and the *Watts* cases were entirely different. It is therefore plain that the judge in the *Nantasket* case was merely following the *Pennell* decision as a precedent of a district court in the same circuit with himself. The case, therefore, as an authority adds nothing to the *Pennell* case which it blindly follows.

On petition for rehearing in the present case the attention of the court was directed to this Court's refusal of certiorari in the contrary decisions of the Second Circuit Court of Appeals; but the court refused to reconsider its decision. Perhaps the court thought that the question involved had not received on petition for certiorari the careful attention its importance merited; but in view of the obvious public importance of the question presented, it seems clear to petitioner that the writs in these cases were refused because the decisions of the Second Circuit Court of Appeals were plainly in accord with the law as previously expounded by this Court in the *Augarica* case and in accord with the plain meaning of the private acts involved.

POINT V.

THE ALLOWANCE OF INTEREST WILL ACCORD WITH THE DECISIONS OF THIS COURT IN MANY SIMILAR SITUATIONS AND IS NECESSARY TO A FULL AND FAIR REPARATION FOR THE GOVERNMENT'S TORT

There is nothing unheard of in the Government's paying interest on the principal amount of losses inflicted by its wrongful acts. From the earliest days of American maritime jurisprudence interest has been awarded in prize cases quite without statutory authority to the owners of vessels illegally seized and condemned.

The Charming Betsey, 2 Cranch, 64.
The Anna Maria, 2 Wheat. 327, 335.
The Amiable Nancy, 3 Wheat. 546, 560.
The Apollon, 9 Wheat. 362, 377.
The Nuestra Senora de Regla, 108 U. S. 92, 104.
The Paquete Habana, 189 U. S. 453, 467.
The Labuan, Blatchf. Pr. Cas. 165.
The Sybil, Blatchf. Pr. Cas. 615.

Moore in his Digest of International Law, Vol. VI, page 1029, says:

> "Interest, according to the usage of nations, is a necessary part of just national indemnification."

Cf. Moore, International Arbitrations, 339, 4313, 4228, 3765, 1575-6, 1745-6, 1004-5, 1465-6; Hague Court Reports, 228, 234, 297.

The question of interest in the present case is not unlike the situation where a tax payer seeks by suit to recover taxes illegally exacted. This Court has held that the taxpayer in such circumstances is entitled to interest from the time of the illegal exaction. *Erskine* v. *Van Arsdale*, 15 Wall. 75.

In *Miller* v. *Robertson*, 266 U. S. 243, a suit was brought against the Alien Property Custodian under Section 9 of the Trading with the Enemy Act, Chapter 106, 40 Stat. 411, 419, which merely gives to "any person, not an enemy, or alien of enemy . . . to whom any debt may be owing from an enemy,

or ally of enemy," the right to "institute a suit in equity in the District Court . . . to establish the debt so claimed". Although such a suit had been held in *Banco Mexicano* v. *Deutsche Bank*, 262 U. S. 591, 603, to be one against the United States, and although this act makes no reference to interest, this Court held (p. 257 of the *Robertson* opinion) that interest was properly allowed as an element of that compensation which is a fundamental principle of damages.

In *Standard Oil Co.* v. *United States*, 267 U. S. 76, there was a libel upon two policies of marine insurance issued by the Government insuring the SS. Llama and her freight and advances against war risks, under the Act of Sept. 2, 1914, § 293, 38 Stat. 711, 712. This act provides in Section 5:

> ". . . in the event of disagreement as to the claim for losses, or amount thereof, between the said bureau and the parties to such contract of insurance, an action on the claim may be brought against the United States in the District Court of the United States, sitting in admiralty, in the district in which the claimant or his agent may reside. . . ."

No reference is made to interest, yet it was ordered that interest at six percent should be allowed from the date when the loss became payable by the United States.

Seaboard Airline Railway Company v. *United States*, 261 U. S. 299, presented the question of allowance of interest in an action brought under Section 10 of the Lever Act of August 10, 1917, Chapter 53, 40 Stat. 276, 279 which provides that "the President is authorized to requisition foods, feeds, fuels, and other supplies necessary to the Army, Navy, or other public use . . . and he shall ascertain and pay a just compensation therefor". If the compensation so determined is not satisfactory to the owner, he shall be paid seventy-five per centum of the amount so determined, ". . . and shall be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum will make up such amount, as will be just compensation . . . and jurisdiction is hereby conferred on the United States District Courts to hear and determine all such controversies. . . ." Nothing is said as to interest. This

Court held that the plaintiff was entitled to interest at 7 per-cent, saying (p. 306):

> "The requirement that 'just compensation' shall be paid is comprehensive and includes all elements and no specific command to include interest is necessary when interest or its equivalent is a part of such compensation."

The following cases are in accord:

> *Brooks Scanlon Corporation* v. *United States*, 265 U. S. 106, 123;
>
> *Liggett & Myers Tobacco Company* v. *United States*, 274 U. S. 215, 220;
>
> *Phelps* v. *United States*, 274 U. S. 341, 344.

In *United States* v. *Rogers*, 255 U. S. 163, interest at six per centum per annum was allowed from the date of taking where the United States had condemned land for reclamation purposes under the Land Taking Act of August 1, 1888, c. 728, 25 Stat. 357, although nothing was said therein as to interest.

Interest at 6 per cent was also allowed where the United States through the exercise of the war powers vested in the President, had requisitioned merchant vessels under construction. *Hull No. 5 Compagnie General Transatlantique* v. *United States*, 1927 A. M. C. 485 (Ct. of Claims).

There is also the very recent case of *United States* v. *The Thekla*, 266 U. S. 328 (followed in *The Barendrecht*, 11 Fed. (2d) 377). That was a collision case in which the Luckenbach Steamship Company filed a libel against the barque Thekla for collision with the S. S. E. J. Luckenbach. There was a cross-libel by the owners of the Thekla, whereupon the Government intervened and filed a claim to the Luckenbach on the ground that the vessel was under requisition charter to, and in the possession of, the United States at the time of the collision. The Government also adopted as its own the original libel against the Thekla, but the Government expressly disclaimed any intention of submitting itself to the jurisdiction of the court. It appeared on trial that the Government vessel had been in fault. Though there was no enabling act at all in *The Thekla*, this court approved a decree against the Government

not only for the principal amount of the shipowner's losses, but for interest thereon as well. The court, speaking through Mr. Justice Holmes, said (p. 341):

> "the reasons are strong for not obstructing the application of natural justice against the Government by technical formulas when justice can be done without endangering any public interest."

The reasons for not obstructing the doing of justice are just as strong here as there and in the present case there is a clear and unambiguous legislative act providing "for the relief of the owners of the steam lighter Cornelia"

> "under and in compliance with the rules of said court sitting as a court of admiralty; and that the said court shall have jurisdiction to hear and determine the whole controversy and to enter a judgment or decree for the amount of the legal damages sustained by reason of said collision, if any shall be found to be due either for or against the United States, upon the same principle and measure of liability with costs in like cases in admiralty between private parties with the same rights of appeal".

The petitioner submits that the Government has advanced no sound reason, and, indeed, can advance no sound reason, to justify this court's refusing full and fair restitution in the present case in the face of the stated intent of Congress to provide for petitioner's relief, while continuing to give, as in *The Thekla*, such full and fair restitution in the entire absence of legislative authorization, on the basis merely of executive acts.

The Government suing in admiralty always recovers, when successful, interest as a part of its full compensation.

Full and fair "relief of the owners of the steam lighter Cornelia" requires the payment of interest. The demands of justice are the same in the present case as in *The Thekla* and only a strained and artificial view of the statute here involved can discern a Congressional intent to give less than justice requires.

CONCLUSION

The decree of the Circuit Court of Appeals for the First Circuit should be amended to allow interest at the legal rate applied in the District of Massachusetts, with costs to your petitioner.

Respectfully submitted,

JOHN W. DAVIS,
FOYE M. MURPHY,
Counsel for Petitioner.

APPENDIX A.

(42 Stat. 1778)

AN ACT FOR THE RELIEF OF THE OWNERS OF THE STEAMSHIP ESPERANZA.

Private, No. 192, 67th Congress.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the claim of the New York and Cuba Mail Steamship Company, owner of the American Steamship Esperanza, against the United States for damages alleged to have been caused by collision between said vessel and the United States destroyer Conner on the 15th day of February, 1918, off Barnegat Light, New Jersey, may be sued for by the owner of the said American steamship Esperanza in the United States District Court for the Southern District of New York, sitting as a Court of Admiralty, and acting under the rules governing such court, and said court shall have jurisdiction to hear and determine such suit and to enter judgment or decree for the amount of such damages and costs, if any, as shall be found to be due against the United States in favor of the owner of the said American steamship Esperanza, or against the owner of the said American steamship Esperanza, in favor of the United States, upon the same principles and measures of liability as in like cases in admiralty between private parties, and with the same rights of appeal: *Provided*, that such notice of the suit shall be given to the Attorney General of the United States as may be provided by order of the said court, and it shall be the duty of the Attorney General to cause the United States attorney in such district to appear and defend for the United States: *Provided further*, that said suit shall be brought and commenced within four months of the date of the passage of this Act.

Approved, February 28, 1923.

APPENDIX B.

(42 Stat. 1569.)

AN ACT AUTHORIZING THE OWNERS OF THE STEAMSHIP TEXAS TO BRING SUIT AGAINST THE UNITED STATES OF AMERICA.

Private, No. 9, 67th Congress.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the claim of the owners of the steamer Texas arising out of a collision between said steamer and the United States steamer Frederick der Grosse, off Tompkinsville, Staten Island, in the harbor of New York, on the third day of September, 1917, for and on account of the losses alleged to have been suffered in said collision by the owners of said steamer Texas by reason of damages to and detention of said steamer may be submitted to the United States District Court for the Southern District of New York, under and in compliance with the rules of said court sitting as a Court of Admiralty; and that the said court shall have jurisdiction to hear and determine the whole controversy and to enter judgment or decree for the amount of the legal damages sustained by reason of said collision, if any shall be found to be due either for or against the United States, upon the same principle and measure of liability, with costs, as in like cases in admiralty between private parties, with the same rights of appeal: *Provided*, that such notice of the suit shall be given to the Attorney General of the United States as may be provided by order of the said court, and it shall be the duty of the Attorney General to cause the United States Attorney in such district to appear and defend for the United States: *Provided further*, that said suit should be brought and commenced within four months of the date of the passage of this Act.

Approved, November 17, 1921.

APPENDIX C.

(42 Stat. 1796)

AN ACT FOR THE RELIEF OF THE COMMONWEALTH AND DOMINION LINE (LIMITED), OWNER OF THE BRITISH STEAMSHIP PORT PHILLIP.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the claim of the Commonwealth and Dominion Line (Limited), owner of the British Steamer Port Phillip against the United States for damages and loss alleged to have been caused by the collision of said vessel with the United States steam collier Proteus in New York harbor on October 16, 1918, may be sued for by the said owner of the British steamer Port Phillip in the District Court of the United States for the Eastern District of New York, sitting as a court of admiralty and acting under the rules governing such court, and said court shall have jurisdiction to hear and determine such suit to the extent only of such damages suffered other than claims for demurrage to said vessel and to enter a judgment or decree for the amount of such damages and costs, if any, as shall be found to be due against the United States in favor of the owner of the British Steamer Port Philip or against said owner in favor of the United States, upon the same principles and measures of liability as in like cases in admiralty between private parties and with the same rights of appeal: *Provided*, That such notice of the suit shall be given to the Attorney General of the United States as may be provided by order of the said court, and it shall be the duty of the Attorney General to cause the United States attorney in such district to appear and defend for the United States: *Provided further*, That said suit shall be brought and commenced within four months of the date of the passage of this Act.

Office Supreme Court, U. S.
FILED
OCT 15 1928
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1928.

No. 15.

BOSTON SAND & GRAVEL COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

SUPPLEMENTAL BRIEF FOR THE PETITIONER ON REARGUMENT.

JOHN W. DAVIS,
FOYE M. MURPHY,
Counsel for Petitioner.

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Supreme Court of the United States

OCTOBER TERM, 1928.

BOSTON SAND & GRAVEL COMPANY, Petitioner, v. UNITED STATES OF AMERICA, Respondent.	No. 15.

SUPPLEMENTAL BRIEF FOR THE PETITIONER ON REARGUMENT.

The petioner in the present case, of course, recognizes that no action to recover for governmental torts can be maintained against the Government without its consent and also that recovery can in no case be broader than the consent given. Congress may unquestionably authorize a tort claimant to recover a part only of the damages that would be due in like cases between private persons. Petitioner recognizes this and, consequently, that if the consent in the present case does not extend to the award of interest, interest cannot be recovered.

The petitioner's case rests upon the proposition that governmental consent to the award of interest in the present case has been given.

The authorities that the petitioner relied upon in its main brief establish that such consent may be given, either by providing for the award of interest *eo nomine* or by providing for its award in a proper case in more generic terms, as by the name of damages or by reference to principles of liability from which it follows that interest must have been intended to be allowed. It may also be given by the Government's sub-

mitting itself to the general jurisdiction of a court for the purpose of having the whole controversy determined. These are all recognized to be modes of governmental consent. In the present case, the statute does not name "interest" specifically; but the statute does provide for the assessment of "damages" against the Government; it does refer to principles of liability from which it follows that interest was intended to be allowed (*Hicks* v. *Guinness*, 269 U. S. 71, 81); and it does contain a general submission of the whole controversy to an admiralty court for determination.

In its original brief, the petitioner advanced the contention that an enabling act providing for the assessment of "damages" against the Government is sufficient to give to a claimant interest against the Government whenever, in like circumstances between private persons, interest would be allowed as part of the damages to be awarded.

In support of this proposition, the petitioner cited the statement of this court in *United States ex rel. Angarica* v. *Bayard*, 127 U. S. 251, 260:

> "It has been established, as a general rule in the practice of the Government, that interest is not allowed on claims against it [the Government], whether such claims originate in contract or in tort, and whether they arise in the ordinary business of administration or under private acts of relief, passed by Congress on special application. The only recognized exceptions are where the Government stipulates to pay interest and where interest is given expressly by an Act of Congress, *either by the name of interest or by that of damages*." (Italics ours.)

It seems to the petitioner clear beyond controversy that this court intended to say in the above quoted passage that a statute consenting to the assessment of "damages" against the Government may sometimes be a sufficient generic consent to the award of "interest". It seems equally clear that the court did not intend to say that every such statute would give a right to interest and the petitioner has advanced no such contention.

The word "damages" is a juridical term and for its meaning it is of course necessary to turn to the decided cases. In its original brief, the petitioner demonstrated that under the well-settled judicial usage of the term "damages", interest is to be described as "damages" whenever it is given independently of stipulation for it between the parties.

The petitioner therefore suggested that whenever an enabling act provides for the assessment of damages against the Government the inquiry must be whether, independently of stipulation by the parties, interest would be awarded in a like case between private persons. In this suggestion the petitioner followed the example of Attorney General Cushing, whose opinion of September 20, 1855, 7 Op. A. G. 523, 530-531, cited by this court in the *Angarica* case, was undoubtedly the source of the statement from that case already quoted.

The Government in its brief overlooks that the subject-matter of this statute and of this suit is a maritime collision. The remarks contained in the Government's brief as to what might or might not be considered damages in other cases arising at common law, therefore, have no application. As early as the case of *The Santa Maria*, 10 Wheat. 431, this court recognized that interest given in cases of maritime tort is an element of damages. In that case, Mr. Justice Story took occasion to say:

> "The same doctrine applies to the claim of interest made by the libellant. The question was involved in the original proceedings, and the libel itself contains an express prayer for damages, as well as for restitution of the property. Damages are often given by way of interest, for the illegal seizure and detention of property; and, indeed, in cases of tort, if given at all, interest partakes of the very nature of damages."

Later, in *The Wanata*, 5 Otto. (95 U. S.) 600, at pages 613, 614, this Court expanded the doctrine as follows:

> "Interest in such a case is allowed as well as costs; and in case of appeal, the interest is cast upon the whole

amount of the decree in the court below, including the costs as well as the amount of the damage. *The Dundee*, 2 Hagg. 137.

"Due objection to a decree settled in that form was made in that case; but Lord Stowell held that the allowances were correct, that the costs to which the party is put to recover his just damages is a part of his loss, and that the costs in such a case are properly added to the damages in the computation of interest. Objection was also made in that case to the allowance of interest, as the damages were equal to the value of the ship; but the same learned judge answered that the sufferer is entitled to such costs as he shall incur in recovering the value of the ship, and to interest if payment is delayed, meaning, of course, that the party causing the delay is liable in such a case; and he added, that the suffering party is entitled to remuneration for the costs to which he is driven for recovering his loss, as the costs constitute a part of the same; that the act of Parliament is not guilty of the injustice which would ensue if it excluded the costs, which are necessary for replacing the sufferer in a just state of compensation. Such a party if he is reinstated in the value of the property without litigation, is not entitled to costs; but if he cannot obtain the benefit of the regulation in respect to compensation without being driven to the necessity of a suit, the statute would be chargeable with great injustice if it did not allow him to recover costs; and these remarks apply with equal force to the charge of intervening interest arising from delay occasioned by such litigation."

This view of interest is carried into the rules of this court —see subsection 4 of General Rule 30 of this court and is fully in accord with the decision of this court in *The John Twohy*, 255 U. S. 277, where this court held that an appeal in admiralty, unlike an appeal at common law, is a new trial.

From these authorities it is clear that in so far as an admiralty case is concerned, interest has always been considered not as an item distinct from the damages, but as an item which must be included in the damages allowed in order to compensate the sufferer for his loss.

The same view of interest as an item of damages has been taken by this court in admiralty cases where the Government was a party.

The Thekla, 266 U. S. 328;
The Nuestra Senora de Regla, 108 U. S. 92;
The Paquete Habana, 189 U. S. 453.

In *The Nuestra Senora de Regla*, a case arising out of the wrongful seizure by the United States authorities in 1861 of the vessel there concerned, "the cause was referred to one of the commissioners of the court to ascertain the amount of the *damages* the claimant had sustained by the seizure and detention of the vessel" (p. 97). Interest was allowed amongst other items of damages. On appeal the award was affirmed, this court saying (p. 102):

> "Under these circumstances, we cannot but think that the United States have voluntarily submitted themselves to the Court at the instance of the Spanish Government, and with the consent of the claimant *for the purposes of having the questions of damages growing out of the capture judicially settled according to the rules applicable to private citizens in like cases.*" (Italics ours).

In *The Paquete Habana*, a similar case, such "damages" were to be assessed "as to justice may appetrain and as the legal responsibility therefor may appear" (p. 464). Interest was allowed as an element of "compensatory damages". This court on appeal re affirmed its position in *The Nuestra Senora de Regla*, saying (p. 466):

> "In the Nuestra Senora de Regla, 108 U. S. 92, at 102, the Court was of opinion that the United States had submitted to the jurisdiction of the Court so far as to warrant the ascertainment of *damages according to the rules applicable to private persons in like cases.*" (Italics ours).

In *The Thekla*, a collision libel, in which the United States voluntarily filed a claim "'without submitting itself

to the jurisdiction' of the court" (p. 338), this court approved an award of damages against the Government that included interest. At page 341 of the opinion it was said:

> "As has been said in other cases the question of damages to the colliding vessel necessarily arose and it is reasonable for the Court to proceed to the determination of all the questions legitimately involved, even when it results in a judgment for damages against the United States. *The Nuestra Senora de Regla*, 108 U. S. 92. *The Paquete Habana*, 189 U. S. 453, 465, 466. We gather that our conclusion accords with the opinion of the English Courts. *The Newbattle*, 10 P. D. 33. *The Teresita*, (1922) P. 259, 272. It is said that there is no statute by which the Government accepted this liability. It joined in the suit and that carried with it the acceptance of whatever liability the courts may decide to be reasonably incident to that act.
>
> "It follows from what has been said, without the need of going further, that the stipulation ordered before the United States made itself a party, is valid, and that interest and costs can be recovered from the Fleet Corporation. See *Sloan Shipyards Corporation* v. *United States Shipping Board Emergency Fleet Corporation*, 258 U. S. 549. Interest was allowed against the United States in *The Nuestra Senora de Regla* and *The Paquete Habana*, *supra*, and interest and costs by the judgment affirmed in *Porto Rico* v. *Ramos*, 232 U. S. 627."

In all of these cases this court held that because the Government had submitted generally to the jurisdiction of the court, interest was to be allowed as an item of the damages. It is obvious that to decline to allow it would be unjust and a disallowance of full compensation to which the sufferer was entitled.

It is noteworthy that in the *Thekla*, as in the present case, the controversy arose out of a collision. The only difference between the two cases is that in *The Thekla*, the Government voluntarily entered the proceedings, whereas here the proceedings were instituted under the terms of a statute authorizing such proceedings. During the course of the first argument in the present case, we understood Mr. Justice

Brandeis to ask counsel for the Government whether in a suit by the Government, interest was allowed on counter-claims. Counsel for the Government replied in the negative, citing *United States* vs. *North American Company*, 253 U. S. 330. Counsel for the Government overlooked the fact that the present case differed materially from the *North American* case, and that this court had decided in a unanimous opinion in *The Thekla*, that in a maritime collision case such as this interest be allowed on counterclaims. *The Thekla, supra.* This is true because of the different rule which applies in admiralty. And in a collision case there can be no doubt, for as was said in *The Thekla:*

> "A collision involves two vessels. The trial of such cases in the ordinary course is upon libel and cross libel, consolidated under authority of statute. Rev. Stats. §921. *The North Star*, 106 U. S. 17. If both parties were in fault the entire damage would be divided equally between them, and it could not be argued that the United States could avoid the consequences of the rule although the damage to the other vessel might bar its recovering anything. This shows that the subject-matter is the collision, rather than the vessel first libelled. *Boucker* v. *United States*, 186 U. S. 135, 139. The libel in such a case is like a bill for an account, which imports an offer to pay the balance if it should turn out against the party bringing the bill."

The meaning which counsel for the Government has sought to give to the word "damages" and the authorities which he has cited in support of his argument, is beside the issue. Nor does this case require a decision that in all tort cases, whether at common law or in admiralty, interest must be awarded as an item of damages. It may be noted in passing that even at common law, in certain cases, interest is allowed as damages even against the Government. *Porto Rico* v. *Ramos*, 232 U. S. 627 (*cf.* statement of Holmes, J. in *The Thekla*, 266 U. S. 328, 341); *Ex parte The Republic of Colombia*, 195 U. S. 604. In the *Colombia* case, it was said (p. 606) that

> "• • • When the Republic submitted itself to the courts, it must be taken to have done so on the same terms as other litigants, so far as fixing the amount which it was to pay was concerned; that being the matter on which the action of the courts was invoked, it seems to us that it was competent for the Circuit Court to decree the payment of interest as in an ordinary case."

United States v. *North American Company*, 253 U. S. 330, does not conflict with the implications of these cases; neither does *United States* v. *Sherman*, 98 U. S. 565, nor *United States* v. *North Carolina*, 136 U. S. 211,—cases cited in the course of the *North American* opinion. For in all three of these cases the actions were in theory contractual and in none was the defendant government generally before the court as it was in the other cases that have been discussed. Not even in the *North American* case; for the jurisdiction of the Court of Claims, from which the case came, is limited to contract actions, express or implied, and so, its power to assess damages, to damages appropriate to that form of action. Neither was the claimant in any of these cases proceeding under a statute calling for the assessment of "damages" against the Government.

It was urged upon the court in the *North American* case that the interest sought was not sought as interest, *i. e.*, as damages for detention of payment of a sum due; but as damages, conventionally measured, for the use and occupation of the claimant's land by the Government prior to the passage to the Government of title thereto. It was urged that the action, though in form contractual as for money promised to be paid to the claimant on the date of the wrongful taking of his land, was in fact delictual and so required the giving of just compensation for the wrong done, such just compensation, under well-settled principles, comprehending interest for the period above mentioned. But the court held that the theory, upon which the jurisdiction of the Court of Claims alone depended, would have to be consistently maintained, fictitious though it might be. The court said (p. 337):

> "It is an action of contract to recover money which the United States is assumed to have promised to pay; and the assumed promise was to pay the value at the time of the taking. The suit is in effect an action on two counts—one for the value of the mining claim, the other for use and occupation after December 8, 1900, at the rate of $7500 a year. • • • But as • • • the loss of the use of the money [the value of the mining claim at the time of the taking] results from the failure to collect sooner a claim held to have accrued when the company's property was taken, that which the company seeks to recover is, in substance, interest, and that Congress has denied to the Court of Claims the power to allow."

All other reasons apart, the statute (section 177 of the Judicial Code) made the result in the *North American* case inevitable since it specifically forbade allowance of unstipulated interest by the Court of Claims.

It is true the court in the course of its opinion did say (p. 336) that the result accorded with the "common-law rule",

> "that delay or default in payment (upon which, in the absence of express agreement, the right to recover interest rests), can not be attributed to the sovereign";

but obviously that rule is applicable only where interest is given for "delay or default in payment"—the only type of case, of course, to which the jurisdiction of the Court of Claims in theory extended. It is, of course, conceivable that this rule might forbid the recovery of interest against the Government at law even in a tort case, since the orthodox theory of the law courts is that upon breach of any legal duty there arises *eo instanti* a new secondary, or remedial, right to be paid damages (*cf. Die Deutsche Bank* v. *Humphrey*, 272 U. S. 517), and under that orthodox theory, the right to interest arises only upon a secondary wrong, which, as pointed out in the *North American* case, consists in "delay or default in payment" of this secondary, or remedial, claim. But bearing against any such conclusion there stands what was done in the *Ramos* case.

Be the rule at law what it may, however, it is at least clear that this theory of the law courts is not that upon which recovery is allowed for a maritime collision. The right of the libellant in such cases is to *restitutio in integrum*—a right to a full and complete indemnity. The aim of the admiralty court is by its decree to put the owner of a lost vessel into as good a position pecuniarily as he would have occupied, had the collision not occurred. Thus in the leading treatise on the subject—*Roscoe on Damages in Marine Collisions*—it is stated at page 5:

> "The object of the award of damages arising out of a collision is to place the owner of the lost or injured ship as nearly as may be in the same pecuniary position as he would have been in but for the collision. In a series of judgments in the Admiralty Court, (*The Woodrup Sims*, (1815) 2 Dods. 83, 85; *The Dundee*, (1882) 1 Hagg. 121; *The Clyde*, (1886) Swab. 23; *The Hebe*, (1847) 2 W. Rob. 530) this principle has been called *restitutio in integrum*—the 'right to a full and complete indemnity'—and this is therefore the measure and standard of damages which are recoverable by the owner of a ship which has been injured in a collision by a wrongful act on the part of another person."

The difference between law and admiralty courts as to the theory of recovery is so marked that in England where, in the absence of statute, as is well known, interest as damages is scarcely recoverable at all in the law courts, the admiralty courts, nevertheless, allow interest to collision libellants as a matter of course as a part of their damages. (*Cf.* the excerpt from the opinion of Sir Charles Butt in *The Kong Magnus*, (1891) Prob. Div. 223, quoted pp. 9-10, of the petitioner's main brief.)

This difference in theory of recovery in admiralty and at law is also well illustrated by *The Gertrude*, 6 Aspinall's Maritime Cases, N. S., 315. That case, after trial on the merits at law, was transferred to admiralty for the assessment of damages. Although interest would not have been recoverable at law, the consent to transfer was held to con-

stitute a consent to the application of admiralty principles and interest was accordingly awarded.

The admiralty view is the same in the United States as in England. In *The Baltimore*, 8 Wall. 377, Mr. Justice Clifford said (p. 385).

> "*Restitutio in integrum* is the leading maxim in such cases."

As early as 1824 in *The Apollon*, 9 Wheat. 362, Mr. Justice Story held that

> "• • • where the vessel and cargo are lost or destroyed, the measure has been deemed to be the actual value, together with interest upon the amount from the time of the trespass. Where there has been a partial injury only, the loss being ascertained, a similar rule has been applied."

The rule in admiralty was noted in *Frazer* v. *Bigelow Carpet Company*, 141 Mass. 126, by Mr. Justice Holmes, then a member of the Massachusetts court:

> "Interest is allowed in the admiralty upon damages for collisions, and other courts have adopted the admiralty doctrine."

In support of the statement the following cases were cited:

The Amalia, 34 L. J. Adm. 21;
The Dundee, 2 Hagg. Adm. 137;
The Mary J. Vaughan, 2 Ben. 47;
Parrott v. *Knickerbocker Ice Co.*, 46 N. Y. 361;
Mailler v. *Express Propeller Line*, 61 N. Y. 312.

Among other American cases commenting on the point, *The J. G. Gilchrist*, 173 Fed. 666, may also be noticed. In that case the court said (p. 672):

> "Collision cases are now called to my attention by which it is clearly shown that, not only is demurrage a proper element of damages, but that interest should be allowed from the date of collision, unless in the discretion of the court there are special reasons for its disal-

> lowance. The reason for the rule is that the party damaged is entitled to a complete return for the loss sustained by reason of the tort, and the interest is regarded as a part of the indemnification or damage award."

This decision was affirmed by the Circuit Court of Appeals for the Second Circuit (183 Fed. 105) and was cited approvingly by the Circuit Court of Appeals for the First Circuit in *Eastern S. S. Corp.* v. *Great Lakes Dredge & Dock Co.*, 256 Fed. 497, 505. See also *The Mary J. Vaughan*, 16 Fed. Cas. 9217, affirmed by this court in *The Vaughan and the Telegraph*, 14 Wall. 258; *The Connors*, 1927, A. M. C. 1713 (C. C. A. 2d); *The Ressaprage*, 1925 A. M. C. 1537 (S. D. Ga.) *The James A. Hoyt*, 1927 A. M. C., 779, 18 Fed. (2d) 291 (E. D. Mich.); and cases cited pp. 6-13 of petitioner's principal brief.

There is not a shadow of doubt as to this difference in the theory of recovery in admiralty and at law; and in admiralty, interest is universally regarded as an essential element of the "full and complete indemnity" to which the collision libellant is entitled. Without interest as the conventionally measured use-value of his ship during the period between collision and final decree, the collision libellant could not be restored, as the rule of *restitutio in integrum* requires, to the pecuniary position he would have been in, had the collision not occurred.

With interest allowed for such an object and under such a theory, the "common-law rule" mentioned in the *North American* case obviously could have nothing to do, even if the centuries of admiralty's separate history could be ignored to allow of importing this rule of the law courts into a maritime case. If this seem doubtful, it is necessary but to point to law cases in which the theory of recovery has been the same as that held in courts of admiralty.

Thus, as noted in *Frazer* v. *Bigelow Carpet Company*, cited *supra*, interest is allowed in collision cases even in courts of law. In *Parrott* v. *Knickerbocker Ice Company*, 46 N. Y. 361, the court said (p. 369):

"The only remaining questions raised related to damages. By stipulation of the parties, but two items were left to be passed upon by the referee, viz., the value of the sloop, and interest. There was sufficient evidence to sustain his finding, as to the value of the vessel, and we think that interest on the value of the property lost was properly allowed. In cases of trover, replevin and trespass, *interest on the value of property unlawfully taken or converted, is allowed by way of damages, for the purpose of complete indemnity of the party injured, and it is difficult to see why, on the same principle, interest on the value of property lost or destroyed, by the wrongful or negligent act of another, may not be included in the damages.* (*Propeller Mary Vaughan* v. *Steamboat Telegraph*, 2 Benedict, 47; Sedgwick on Damages, p. 385, and cases cited; *Walrath* v. *Redfield*, 18 N. Y. 457.)" (Italics ours.)

The same result has been reached by this court itself under the identical theory of a full and complete indemnity in the condemnation cases. In *Seaboard Airline Railway Company* v. *United States*, 261 U. S. 299, this court said (p. 304):

"The compensation to which the owner is entitled is the full and perfect equivalent of the property taken. *Monongahela Navigation Company* v. *United States*, 148 U. S. 312, 327. It rests on equitable principles and it means substantially that the owner shall be put in as good a position pecuniarily as he would have been if his property had not been taken. *United States* v. *Rogers* (C. C. A., Eighth Circuit), 257 Fed. 397, 400. He is entitled to the damages inflicted by the taking. *Northern Pacific Ry. Co.* v. *North American Telegraph Co.* (C. C. A., Eighth Circuit), 230 Fed. 347, 352, and cases there cited.

"• • •

"• • • Where the United States condemns and takes possession of land before ascertaining or paying compensation, the owner is not limited to the value of the property at the time of the taking; he is entitled to such addition as will produce the full equivalent of that value paid contemporaneously with the taking. Interest at a proper rate is a good measure by which to ascertain the amount so to be added. • • •

> "The addition of interest allowed by the District Court is necessary in order that the owner shall not suffer loss and shall have 'just compensation' to which he is entitled."

The court therefore held (p. 306) that the omission from the Lever Act (40 Stat. 276, 279) of any specific command to include interest was inoperative to preclude its allowance and interest was accordingly decreed. The following cases are in accord:

Brooks-Scanlon Corporation v. *United States*, 265 U. S. 106, 123;
Liggett & Myers Tobacco Company v. *United States*, 274 U. S. 215, 220;
Phelps v. *United States*, 274 U. S. 341, 344.

It is obvious that the words in which this court described the requirements of "just compensation" in the *Airline* case are almost the exact words in which, it has been seen, *supra*, the admiralty courts describe the requirements of *restitutio in integrum*. If the rule, that "delay or default in payment will not be attributed to the sovereign", is inoperative to prevent the allowance of interest in the condemnation cases, it clearly should be here also, since the object and the theory of allowance is in the two cases precisely the same. And finally there is the stubborn fact that interest was allowed in *The Nuestra Senora de Regla*, and in *The Paquete Habana*, and in *The Thekla*. It seems plain, then, that, on principle and authority alike, "damages" as against the Government in maritime collision cases must, and does, include interest.

The contention made by counsel for the Government that there is a distinction between interest and other items of "damages" in a collision case is unsound. The contention of the Government's counsel is apparently that because the court has a discretion to allow or disallow interest, this shows *ipso facto*, that interest is not properly included within the word "damages". This overlooks the fact that in a maritime col-

in the sum of $17,215.17, and to the libellants as owners of the "Golden Rule" and for the claim on account of certain personal effects of the crew, in the sum of $9,205.45. It was further decreed that the owners of the "Chattahoochee" might recoup from the owners of the "Golden Rule" one-half of the sum of $17,215.17, or $8,607.58, this being the damages which were paid to the owners of the cargo. From this decree the owners of the "Golden Rule" took an appeal. As they were unsuccessful in the appeal to this court, no interest was allowed on the balance of the award due the "Golden Rule".

There are only sixteen cases in which there has been a partial disallowance of interest. We have grouped these sixteen cases below, from which it appears that eight of them are cases in which damages were assessed on the basis of a lump sum, and therefore may be disregarded:

Damages assessed on a lump sum basis:

Waring v. *Clarke*, 5 How. 441;
The Propeller Monticello, 17 How. 152;
Whitridge v. *Dill*, 23 How. 448;
The Louisiana, 3 Wall. 164;
The Washington and Gregory, 9 Wall. 513;
The Lucille, 15 Wall. 676;
The Commerce, 16 Wall. 33;
The Albert Dumois, 177 U. S. 240.

Interest allowed in part and on decree:

St. John v. *Paine*, 10 How. 557;
McCready v. *Goldsmith*, 18 How. 89;
Altee v. *Packet Company*, 21 Wall. 389;
The New York, 175 U. S. 187.

There is no discussion of the question of interest in these cases, but in the case of *The New York*, 175 U. S. 187, damages were reduced by this court.

Interest disallowed prior to decree:

Newton v. *Stebbins*, 10 How. 586;
The Potomac, 105 U. S. 630;
The Scotland, 118 U. S. 507;
The Des Moines, 154 U. S. 584.

In *Newton* v. *Stebbins*, 10 Howard, 586, the libellant was awarded, by the commissioner appointed to assess damages, $3,328.25. On exceptions, this award was reduced to $2,403.70. Apparently interest was disallowed because of the excessive demand for damages made by the libellant, although there is no discussion of the subject in the books.

In *The Potomac*, 105 U. S. 630, there had been delay in entering decree.

In *The Scotland*, 118 U. S. 507, this court considered that the circuit court of appeals might have had good reason for exercising its discretion in not allowing interest on the value of the strippings, which the respondent apparently had sought leave to surrender to the court. The court also disallowed interest on costs because of the delay in entering decree.

In *The Des Moines*, 154 U. S. 584, the district court held both vessels to blame. The judgment of the district court was affirmed on appeal by the circuit court of appeals. The owners of the "Des Moines" alone appealed from the decree of the circuit court to this court.

Interest in Collision Cases in the United States Reports.

Cases in which it appears from the reports or the records filed in the clerk's office of this court that interest has been allowed in full.

Title of Case.	*Reported.*
The Genesee Chief,	12 How. 443.
Fretz v. Bull,	12 How. 466.
The New York v. Rae,	18 How. 223.

Title of Case.	*Reported.*
Culbertson v. Shaw,	18 How. 584.
Ure v. Coffman,	19 How. 56.
Rogers v. The St. Charles,	19 How. 108.
N. Y. & V. S. S. Co. v. Calderwood,	19 How. 241.
Snow v. Hill,	20 How. 543.
The Louisiana,	21 How 1.
Union S. S. Co. v. N. Y. & Va. S. S. Co.,	24 How. 307.
The New Philadelphia,	1 Black 62.
The Propeller Commerce,	1 Black 574.
The Commander-in-Chief,	1 Wall. 43.
Sturgis v. Clough,	1 Wall. 269.
The Ann Caroline,	2 Wall. 538.
The Ottawa,	3 Wall. 268.
The Granite State,	33 Wall. 310.
Bentley v. Coyne,	4 Wall. 509.
The Hypodame,	6 Wall. 216.
The Vanderbilt,	6 Wall. 225.
The China,	7 Wall. 53.
The Carroll,	8 Wall. 302.
The Baltimore,	8 Wall. 377.
The Potomac,	8 Wall. 590.
The Johnson,	9 Wall. 146.
The Fairbanks,	9 Wall, 420.
The Alleghany,	9 Wall. 522.
The City of Paris,	9 Wall. 634.
The Syracuse,	9 Wall. 672.
The Columbia,	10 Wall. 246.
The Fannie,	11 Wall. 238.
The Spray,	12 Wall. 366.
Norwich Co. v. Wright,	13 Wall. 104.
The Bridgeport,	14 Wall. 116.
The Mabey & Cooper,	14 Wall. 204.
The Vaughan,	14 Wall. 258.
The Telegraph,	
The Cayuga,	14 Wall. 270.
The Webb,	14 Wall. 406.

Title of Case.	*Reported.*
Merrill v. Petty,	16 Wall. 338.
The Favorita,	18 Wall. 598.
The Wenona,	19 Wall. 41.
The Pennsylvania,	19 Wall. 125.
The Clarita & Clara,	23 Wall. 1.
The Seal Gull,	23 Wall. 165.
The Teutonia,	23 Wall. 77.
The Free State,	91 U. S. 200.
The Dove,	91 U. S. 381.
The City of Washington,	92 U. S. 31.
The American,	92 U. S. 432.
The Galatea,	92 U. S. 439.
The Alabama & The Game-Cock,	92 N. S. 695.
The Atlas,	93 U. S. 302.
The Stephen Morgan,	94 U. S. 599.
The Colorado,	91 U. S. 692.
The Wanata,	95 U. S. 600.
The Virginia Ehrmann,	97 U. S. 309.
The City of Hartford,	97 U. S. 323.
The Benefactor,	102 U. S. 214.
The Civilita,	103 U. S. 699.
The Connecticut,	103 U. S. 710.
The Anna Lindsley,	104 U. S. 185.
The Scotland,	105 U. S. 24.
The S. C. Tyron,	105 U. S. 267.
The New Orleans,	106 U. S. 13.
The North Star,	106 U. S. 17.
The Nevada,	106 U. S. 154.
The Sterling & Equator,	106 U. S. 647.
The Belgenland,	114 U. S. 355.
The Charles Morgan,	115 U. S. 69.
The City of Norwich,	118 U. S. 468.
The Great Western,	118 U. S. 520.
The Manitoba,	122 U. S. 97.
The Maggie J. Smith,	123 U. S. 349.
The Nacoochee,	137 U. S. 330.

Title of Case.	*Reported.*
The E. A. Packer,	140 U. S. 360.
The Blue Jacket,	144 U. S. 371.
The City of New York,	147 U. S. 72.
The Britannia,	153 U. S. 130.
The St. John,	154 U. S. 586.
Hutchinson v. The Northfield,	154 U. S. 629.
The Breakwater,	155 U. S. 252.
The Oregon,	158 U. S. 186.
The Delaware,	161 U. S. 459.
The Umbria,	166 U. S. 404.
The Victory & The Plymothian,	168 U. S. 410.
Workman v. New York City,	179 U. S. 552.
The Barnstable,	181 U. S. 464.
Lie v. S. F. & P. S. S. Co.,	243 U. S. 291.
Liv., etc., Nav. Co. v. Br. Term'l,	251 U. S. 48.
The Thekla,	266 U. S. 328.
The Proteus Cushing,	268 U. S. 146.
The Newport Sven,	276 U. S. 454.

Cases which may be disregarded because the question of interest could not have arisen because the libels were dismissed or the appeals were from judgments on jury verdicts.

Title of Case.	*Reported.*
Bussy v. Donaldson,	4 Dall. 206.
Smith v. Condry,	1 How. 28.
Strout v. Foster,	1 How. 89.
Williamson v. Barrett,	13 How. 101.
Walsh v. Rogers,	13 How. 283.
Stainback v. Rae,	14 How. 532.
Peck v. Sanderson,	17 How. 178.
Goslee v. Shute,	18 How. 463.
N. Y. & B. Tr. Co. v. Phil. & S. S. N.	
The Resolute & Northerner,	1 Wall. 682.

Title of Case.	*Reported.*
The Morning Light,	2 Wall. 550.
The Grace Girdler,	7 Wall. 196.
The Nichols,	7 Wall. 656.
The Gray Eagle,	9 Wall. 505.
The Farragut,	10 Wall. 334.
The Scotia,	14 Wall. 170.
The Java,	14 Wall. 189.
The S. B. Wheeler,	20 Wall. 385.
The Dexter,	23 Wall. 69.
Sherlock v. Alling,	93 U. S. 99.
The John L. Hasbrouck,	93 U. S. 405.
Schoonmacher v. Gilmore,	102 U. S. 118.
The Illinois,	103 U. S. 298.
The Adriatic,	107 U. S. 512.
The L. P. Dayton,	120 U. S. 337.
In *re* Morrison,	147 U. S. 14.
The Servia,	149 U. S. 144.
Belden v. Chase,	150 U. S. 674.
The Ludwig Holdberg,	157 U. S. 60.
The Homer Ramsdell Co. v. C. G. T.,	182 U. S. 406.
U. S. v. St. Louis Transp. Co.,	184 U. S. 247.
Davidson S. S. Co. v. U. S.,	205 U. S. 187.
Cornell Steamb. Co. v. Phoenix Constr. Co.,	233 U. S. 593.
The Western Maid,	257 U. S. 419.
Littlejohn v. U. S.,	270 U. S. 205, 215.

Cases concerning which we have been unable to obtain any information on this subject either from the reports or the records on file in the clerk's office of this court.

Title of Case.	*Reported.*
The Schr. Catharine,	17 How. 170.
The Oregon,	18 How. 570.
Crockett v. Newton,	18 How. 581.

Title of Case.	*Reported.*
Cushing v. The John Fraser,	21 How. 184.
N. Y. & L. S. S. Co. v. Rumball,	21 How. 372.
Chamberlain v. Ward,	21 How. 548, 572.
Nelson v. Leland,	22 How. 48.
Hanly v. Balt. S. P. Co.,	23 How. 287.
Pearce v. Page,	24 How. 228.
Newell v. Norton & Ship,	3 Wall. 257.
Woodworth v. Ins. Co.,	5 Wall. 87.
The Siren,	7 Wall. 152.
The Corsica,	9 Wall. 630.
The Suffolk County,	9 Wall. 651.
The Sapphire,	11 Wall. 164.
The Maria Martin,	12 Wall. 31.
Thorp v. Hammond,	12 Wall. 408.
The Ariadne,	13 Wall. 475.
The Merrimac,	14 Wall. 199.
The Continental,	14 Wall. 345.
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The Falcon,	19 Wall. 75.
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The Great Republic,	23 Wall. 20.
The Sunnyside,	91 U. S. 208.
The Juniata,	93 U. S. 337.
The Abbotsford,	98 U. S. 440.
The Clara,	102 U. S. 200.
The Richmond,	103 U. S. 540.
The Martello,	153 U. S. 64.
The Eugene F. Moran,	212 U. S. 446.
White Oak Co. v. Boston Canal Co.,	258 U. S. 341.

lision case, the only mode in which interest can be given is as damages. As Mr. Justice Story said in *The Santa Maria*, 10 Wheat. 431, at page 445:

> "• • • in cases of tort, if given at all, interest partakes of the very nature of damages."

This discretion is not arbitrary and as the analysis (in the appendix to this brief) of all of the maritime collision cases that have been before this court shows, interest is always allowed in the absence of some conduct on the part of the libellant which would make it inequitable to do so, as for instance, laches or vexatious appeals.

From our examination of the reports of maritime collision cases which have been before this court, we find there have been 176 such cases. Of these cases 34 may be disregarded because the question of interest could not have arisen in them because the libels were dismissed or they were appeals from judgment entered on a jury verdict. Of the remaining cases, it appears from either the reports or the records filed in the clerk's office of this court, that in 92 of them interest was allowed fully. In 18 of them interest was not allowed in full. We have discussed these 18 cases at length in the appendix, and it appears from that discussion that there was good cause for disallowance of interest in each of these cases either in whole or in part as the case might be. There remain 32 cases, in which from neither the reported opinions nor from the records on appeal can counsel obtain any information on this subject.

Neither here nor abroad has this discretion prevented the admiralty courts from insisting on the necessity of interest as an element of the collision plaintiff's remedial right—his right to *restitutio in integrum*. The existence of this element of discretion did not prevent the award of interest against the Government in *The Nuestra Senora de Regla*, or in *The Paquete Habana*, or in the *The Thekla*.

It seems to the petitioner that the foregoing considerations demonstrate clearly that an enabling act which provides for

the assessment of "damages" against the Government in a maritime collision case must be held to constitute under the doctrine of the *Angarica* case, *supra*, a sufficient generic consent to the award of interest against the Government; but if it be insisted that something more is needed—something more specific—some reference to a body of law, as in the cases cited in the *North American* case (p. 335), or, as in *United States* v. *McKee*, 91 U. S. 442, some reference to a mode of settlement, from which it can be inferred that interest was intended to be allowed, then still there can be no doubt that interest in the present case should be awarded. For the statute says that the "damages" shall be assessed upon admiralty principles and it says that these principles shall be the same as apply in like cases between private persons. How—short of naming specifically every element of the damages to be awarded, including interest—the intention of Congress could be any more clearly expressed the petitioner does not see.

The Government has contended that the enabling act upon which the present libel is based constitutes but a limited submission to the jurisdiction of the court and, consequently, that *The Nuestra Senora de Regla*, *The Paquete Habana*, and *The Thekla* are all totally irrelevant to the present case, since in them the Government was generally before the court. But where in the statute is the limitation? The only limitation that petitioner can discern is the provision that the determination of the controversy shall be in admiralty but that same limitation obviously also existed in *The Nuestra Senora de Regla*, *The Paquete Habana*, and *The Thekla*. For the rest, the words of the statute are almost the identical words in which this court described the general submission in the above three cases.

In *The Nuestra Senora de Regla*, where it was held that the United States had submitted itself to the jurisdiction of the prize court so that damages might be awarded against it, this court said (p. 102):

> "Under these circumstances we cannot but think the United States have voluntarily submitted themselves to the court at the instance of the Spanish Government, and with the consent of the claimant, *for the purpose of having the questions of damages growing out of the capture judicially settled according to the rules applicable to private persons in like cases.*" (Italics ours.)

In *The Paquete Habana*, 175 U. S. 677 (on a second appeal 189 U. S. 453) this court reaffirmed this ruling:

> "In *The Nuestra Senora de Regla*, 108 U. S. 92, 102, the court was of the opinion that *the United States had submitted to the jurisdiction of the court so far as to warrant the ascertainment of damages according to the rules applicable to private persons in like cases.* It seems to us that the facts here are not less strong." (Italics ours.)

In the private act in the present case the purpose and extent of the submission is stated in substantially the same language as that previously used by this court. Indeed, it seems probable that the words of the act herein were derived from the opinions in these cases. The words of the special act are:

> "• • •the said court shall have *jurisdiction* to hear and determine the whole controversy and *to enter a judgment or decree for the amount of the legal damages sustained by reason of said collision*, if any shall be found to be due for or against the United States, *upon the same principle and measure of liability* with costs *as in like cases in admiralty between private parties* with the same rights of appeal; • • •" (Italics ours.)

The italicized words of the act are in effect a *verbatim* copy of the words of this court just quoted from *The Nuestra Senora de Regla* and *The Paquete Habana*. In both cases interest was awarded against the Government. Surely Congress cannot use substantially this court's exact words and yet intend that those words shall be given a meaning wholly at variance from that which they have hitherto been accorded by this court.

In *The Thekla* this court held that

> "When the United States comes into Court to assert a claim it so far takes the position of a private suitor as to agree by implication that justice may be done with regard to the subject matter."

This, although the executive officers who had filed the claim in *The Thekla* had positively disclaimed all governmental liability. By the act in suit the court is to "have jurisdiction to hear and determine the whole controversy" and to enter a judgment, or decree, for "damages" whether "found to be due *for* or against the United States". Is not the United States, under this act, "assert[ing] a claim" just as it did in *The Thekla?* Has it not expressly agreed to that to which it was held it had "agree[d] by implication" in *The Thekla*—*i.e.*, "that justice may be done with regard to the subject matter"? Should the result, then, not be the same as in *The Thekla?* Or is legislative consent less effective to create private rights than is executive disclaimer?

We can see no answer to the argument that this court has held already that to adjudicate a claim against the Government "according to the rules applicable to private persons in like cases" means that interest runs against the Government if it would run in a like case against a defeated private party. Congress, in using the words "upon the same principle and measure of liability with costs as in like cases in admiralty between private parties", must have intended the same result.

The court must be struck by the fact that the reliance of the Government is upon district court cases that have not been reported and upon declarations of Congress in acts other than that in suit. Petitioner, on the other hand, builds its case upon the single act of Congress that is relevant to this case and upon the reported decisions of the higher courts, including this court itself. The Government's case is, to say the least, somewhat anomalous.

The other acts of Congress which the Government seeks to import into this case, though perhaps insidiously productive

of doubt, are in fact wholly irrelevant; for they are obviously not *in pari materia* with the act in suit and what Congress has done in one of its acts is really no guide to its intention in another.

As to the possible unreported cases in the district courts involving other private acts, it is beyond dispute that such cases could never alter the law as expounded here. Yet the Government has called ill-considered the decisions in the Second Circuit upon the question here at issue, because, as it contends, those decisions are at variance with these unreported cases in certain district courts. The fact is that the courts of the Second Circuit have been fully aware of the general rule that interest is not to be awarded against the Government without its consent. In the principal one of these Second Circuit decisions—that of the Circuit Court of Appeals in *Texas Company* v. *United States*, 16 Fed. (2d) 945—the court said (p. 947):

> "The United States is not liable to pay interest in the absence of a statutory provision to that effect, except where it has contracted to pay it, or where the United States submits itself to the jurisdiction of the court, or if sued, places itself in the position of a private party."

But the court also recognized that

> "Interest may be provided for by the name of legal damages."

and that

> "In a suit between private parties in admiralty growing out of a collision, it has long been settled that interest is awarded as part of the measure of damages. The object of the award of damages is to place the injured party in the same pecuniary position as he would have been in but for the collision. This principle has been referred to in admiralty as that of the right to a full and complete indemnity."

And observing that

> "By the authority of the statute, the appellee may maintain its libel, as it would between private parties."

it held that

> "The phrase 'the legal damages • • • found to be due • • • upon the principles and measure of liability, as in like cases in admiralty between private parties', when given the interpretation intended by Congress in this enactment, includes an award of interest, as is allowed in the case of a litigation between private parties in admiralty. • • • We must give to the language employed its ordinary and accepted meaning. We must presume that Congress intended that the principle of *restitutio in integrum* should be applied, as it is in cases in admiralty of like nature between private parties. • • • Indemnity is not complete without interest. The admiralty courts in suits against private persons have always followed this rule. We think Congress intended that it should be followed in this instance. It was error to refuse interest in the court below."

It must be clear to this court that the Circuit Court of Appeals for the Second Circuit was influenced to its decision by the requirements of the admiralty principle of *restitutio in integrum*. The contrary decisions in the First Circuit have simply disregarded that doctrine.

It is a doctrine, as Roscoe says (*op. cit supra*, p. 6), that is

> "• • • no mere sonorous phrasing but the expression of an intention to assess damages on well-defined legal principles."

It has been used by the courts, he says

> "• • • because it conveyed in a convenient and terse form the idea of the Court of Admiralty that damages should, if possible, place the innocent party in the same pecuniary position as if no injury had been done to him."

It symbolizes all the multifarious facts of admiralty's separate history, its broader and more flexible powers, its more equitable notions—for admiralty is equity: it "administers justice *ex aequo et bono*" (Story, J. in *Plummer* v. *Webb*, 4 Mason, 380)—and, in a case like the present, the principle of *restitutio in integrum* concretely means that an

admiralty court can do justice when perhaps a court of law could not.

For what the petitioner here seeks is no more than simple justice requires and therefore no more than Congress in an act specifically entitled "for the relief of the owner of the steam light Cornelia" might in reason be expected to give. As this court has said in *The Thekla*,

> "The absence of legal liability [on the part of the Government] in a case where but for its sovereignty it would be liable does not destroy the justice of the claim against it."

Sovereign immunity is deeply embedded in our decisional law; but where, as in the present case, the technical and logical grounds that support it are lacking, "the reasons", as this court itself has remarked in *The Thekla*, "are strong for not obstructing the application of natural justice against the Government by technical formulas when justice can be done without endangering any public interest."

The petitioner therefore renews its suit that the decree herein of the Circuit Court of Appeals for the First Circuit be amended to allow interest at the legal rate applied in the District of Massachusetts, with costs to the petitioner.

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Counsel for the Petitioner.

APPENDIX.

Analysis of Maritime Collision Cases Which Have Been Before the Supreme Court of the United States Respecting the Allowance of Interest.

177 Cases.

In 92 of these cases interest was allowed in full from date of collision or demand for payment. In 2 cases, interest was disallowed and in 16 interest was allowed only in part. In 35 cases the question of interest could not have arisen because the libels were dismissed or they were appeals from judgments on jury verdicts. We could obtain no information whatever with respect to whether interest was allowed or disallowed in 32 cases. We have set forth in detail the results of our search.

Of all of the cases that have been in this court, there are only two in which there has been a total disallowance of interest. These cases are *The Elizabeth Jones*, 112 U. S. 514, and *The Chattahoochee*, 173 U. S. 540. From an examination of *The Elizabeth Jones*, it appears that there was much doubt as to whether or not the "Willis" was also at fault. Although a decree was awarded against the "Jones," holding her solely to blame, this court at the end of its opinion, stated:

> "On the whole case, we are of opinion that the decree of the Circuit Court must be affirmed, but without interest on the amount of that decree."

In *The Chattahoochee*, libel had been filed by the owners of the schooner called the "Golden Rule", which was sunk as a result of a collision with the steamer "Chattahoochee". The libellants, the owners of the "Golden Rule", filed their libel not only on their own behalf, as owners of the schooner, but as bailees of the owner of the cargo on the schooner. Damages were awarded to the libellants as bailees of cargo,

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In the Supreme Court of the United States

OCTOBER TERM, 1927

No. 551

BOSTON SAND AND GRAVEL COMPANY, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS OF THE COURTS BELOW

The opinion of the Circuit Court of Appeals dealing with the question of interest (R. 47) is reported in 19 F. (2d) 744.

The opinion of the District Court dealing with the interest question (R. 39) is reported in 16 F. (2d) 643.

JURISDICTION

The decree of the Circuit Court of Appeals was entered June 4, 1927 (R. 60); rehearing denied June 28, 1927 (R. 60). The petition for certiorari was filed September 21, 1927, and granted November 21, 1927. (R. 61.) The jurisdiction of this

Court rests on Section 240 (a), Judicial Code, as amended by the Act of February 13, 1925.

THE QUESTION PRESENTED

The question presented is whether, in a proceeding against the United States in admiralty for collision losses, filed by authority of a private Act of Congress conferring jurisdiction upon the District Court to enter judgment for "legal damages * * * upon the same principle and measure of liability with costs as in like cases in admiralty between private parties," interest upon the several items of damages, from the dates of the losses, is recoverable.

THE STATUTE

An Act for the relief of the owner of the steam lighter *Cornelia:*

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the claim of the owner of the steam lighter Cornelia rising out of a collision between said steam lighter and the United States destroyer Bell in Broad Sound, Boston Harbor, Massachusetts, on the 9th day of August, 1918, for and on account of the losses alleged to have been suffered in said collision by the owner of said steam lighter Cornelia by reason of damages to or the loss of said steam lighter, her boats, engines, boilers, tackle, apparel, furniture, and supplies, may be submitted to the United

States Court for the District of Massachusetts, under and in compliance with the rules of said court sitting as a court of admiralty; and that the said court shall have jurisdiction to hear and determine the whole controversy and to enter a judgment or decree for the amount of the legal damages sustained by reason of said collision, if any shall be found to be due either for or against the United States, upon the same principle and measure of liability with costs as in like cases in admiralty between private parties with the same rights of appeal: *Provided*, That such notice of the suit shall be given to the Attorney General of the United States as may be provided by order of the said court, and it shall be the duty of the Attorney General to cause the United States attorney in such district to appear and defend for the United States: *Provided further*, That said suit shall be brought and commenced within four months of the date of the passage of this Act. [c. 192, 42 Stat. pt. 2, 1590.]

STATEMENT OF THE CASE

This is a libel *in personam* in admiralty, filed in the District Court of the United States for the District of Massachusetts by the petitioner, as owner of the steam lighter *Cornelia*, against the United States, as owner of the destroyer *Bell*, to recover damages arising out of a collision between the two vessels in the channel of Broad Sound at the entrance to Boston Harbor, August 9, 1918. (R. 8.)

The authority for the proceeding is a private Act of Congress approved May 15, 1922, c. 192, 42 Stat. 1590.

The *Cornelia* was beached on the side of the channel and sank in the shallow water. (R. 8 et seq.) The *Bell* sustained minor damage in the collision (R. 5) but no cross libel therefor was filed.

The District Court found the *Cornelia* solely at fault (298 Fed. 768) and dismissed the libel; but, upon appeal, it was held that both vessels were at fault and that the damages should be divided. (R. 6.) On further proceedings, pursuant to the mandate, the District Court entered judgment for the petitioner in the sum of $45,542.34, one-half the damages, without interest. (R. 38.) The case again went to the Circuit Court of Appeals, which approved the holding of the District Court that interest should not be allowed.

SUMMARY OF THE ARGUMENT

(I) It is the settled policy and practice of the Government not to allow interest save in exceptional cases expressly provided for, and without such express statutory authority there can be no recovery thereof.

(II) The statute properly read, giving to each word its usual and ordinary significance, with no effort to enlarge any word or phrase to embrace that not ordinarily comprehended within it, is sufficiently clear, requires no construction and excludes interest. There is a well-recognized distinction be-

tween damages and interest, allowance of which (between private parties) is a matter of discretion and dependent upon the circumstances of each case.

Similar statutes, during a long period of years, have been enacted in the same language—interpreted by the district courts, in case after case, as excluding interest—acquiesced in and relied upon by Congress, sometimes under circumstances utterly inconsistent with the theory that by the language used it contemplated allowance of interest. The interpretation so placed by the courts and approved by Congress became a part of the law and is in accord with the policy of the Government, both generally and in this class of cases, as evidenced by judicial decisions, departmental practice and legislative enactments, including the Act of March 3, 1925, authorizing the courts to hear and determine claims arising out of collisions with public vessels since April 6, 1920.

The correctness of the conclusion reached in the district courts was never seriously questioned prior to the decision of the Circuit Court of Appeals, Second Circuit, in *New York & Cuba Mail S. S. Co.* v. *United States*, 16 F. (2d) 945, on January 10, 1927—*after* enactment of the present statute. And that decision was promptly repudiated by Congress, in that all bills of this character then pending were amended so as expressly to forbid allowance of interest—a practice thereafter adhered to.

ARGUMENT

I

INTEREST MAY NOT BE AWARDED AGAINST THE UNITED STATES INDEPENDENTLY OF EXPRESS STATUTORY AUTHORITY

(*a*) *It is the settled policy and practice of the Government not to allow interest save in exceptional cases expressly provided for*

It can not require citation of authority to prove that the United States may not be sued for a tort until and unless it shall have consented, nor can it be doubted that Congress at its pleasure may authorize recovery of all or only a part of the amount claimed. *Angarica* v. *Bayard*, 127 U. S. 251, 260; *United States* v. *North American Co.*, 253 U. S. 330, 336; and *Seaboard Air Line Ry. Co.* v. *United States*, 261 U. S. 299, 304, lay down the rule.

> It has been established, as a general rule, in the practice of the government, that interest is not allowed on claims against it, whether such claims originate in contract or in tort, and whether they arise in the ordinary business of administration or under private acts of relief, passed by Congress on special application. [*Angarica* v. *Bayard*, *supra*.]

A salutary reason for such a policy is that the delay intervening between the time that the claim arose and the time of its adjudication may often be attributed, in whole or in part, to lack of diligence on the part of the claimant in pressing his demand. *United States* v. *North American Co.* (p. 338), *supra*.

The Act of June 24, 1910, c. 378, 36 Stat. 605, 607, as amended by the Act of December 28, 1922, c. 16, 42 Stat. 1066 (U. S. C. Title 34, Sec. 599), authorized the Secretary of the Navy to "adjust and determine the amounts due" on small claims arising out of collisions with public vessels, and other statutes have conferred similar authority upon the heads of other departments. The public records show that the practice of the executive departments referred to in *Angarica* v. *Bayard, supra,* of disallowing interest, has not been departed from in such cases.

The Suits in Admiralty Act, March 9, 1920, c. 95, 41 Stat. 525, 526 (U. S. C. Title 46, Secs. 742, 743), authorized libels *in personam* against merchant vessels of the United States operated and managed by the Emergency Fleet Corporation, to proceed "according to the principles of law and to the rules of practice obtaining in like cases between private parties," with interest, limited to four per centum, to "run as ordered by the court."

The Act of March 3, 1925, c. 428, 43 Stat. 1112 (U. S. C. Title 46, Secs. 781, 782), authorized libels *in personam* against, and the impleading of, the United States for damages caused by public vessels after April 6, 1920. The Senate Committee on Claims, when reporting the bill (Sen. Rep. 941, p. 1, 68th Cong. 2d Sess.), thus stated its purpose:

> The bill, in principle, is simply a substitute for the practice, long established, of passing special bills, under which private

> owners have been allowed to submit to our admiralty courts admiralty claims of this character.

The Attorney General, writing the Chairman of the Committee, on April 8, 1924, regarding the proposed bill (Sen. Rep. 941, p. 12, 68th Cong., 2d Sess.), made the following observations:

> Section 2 of the proposed bill provides that actions brought by authority of the bill shall be subject to and proceed according to the Suits in Admiralty Act. The Act allows interest in the discretion of the court from the time the cause of action arises. As applied by the proposed bill, interest would run in collision, salvage, and contract cases from the time the cause of action arose. Relief now granted against the Government in contract matters in the Court of Claims and district courts under the Tucker Act deny interest and allow it only upon the judgment or decree entered. ***In the special Acts heretofore passed granting relief in collision matters the right to recover interest has generally been denied.*** Allowance of interest from the time the cause of action arises in contract matters appears to have more merit than the allowance of interest in tort matters. The policy of the Government should be to allow interest in both classes of actions or to deny interest in both classes of cases. However, as I have stated, this is a legislative matter rather than a question for me to review. (Italics supplied.)

It is significant that the bill was amended and, as finally enacted, contained this provision:

> No interest shall be allowed on any claim up to the time of the rendition of judgment unless upon a contract expressly stipulating for the payment of interest.

(*b*) *Petitioner concedes the rule but relies upon a so-called exception—here analyzed*

Petitioner contends that this case comes, not within the general rule of *Angarica* v. *Bayard*, *supra*, but within the so-called exception—

> where interest is given expressly by an Act of Congress, either by the name of interest or by that of damages—

and refers to an opinion of Attorney General Cushing, September 20, 1855, 7 Op. Atty. Gen. 523, 524–526, 531, for an elaboration thereof.

Mr. Cushing declared (p. 526):

> To the general rule thus laid down, there may possibly be, as Mr. Legare suggests, "some rare and singular exceptions." I confess myself at a loss, however, to say what they are, or, at any rate, to derive a rule from such exceptions.

However, as an "apparent, but not real, exception, if the case exists," he suggests that a statute may authorize recovery of "damages" in a case where "a statute-interest on the detention of money is the established rendering of the term," and illustrates the proposition by a reference to 1 Stat. 85—the Judiciary Act of September 24, 1789, c. 20, 1

Stat. 73, 85, Sec. 23 of which provided that a writ of error should be a *supersedeas* and that, upon affirmance, the court should "adjudge or decree to the respondent in error just damages for his delay, and single or double costs at their discretion."

But that would be quite a different case. And Mr. Cushing's language falls far short of saying that " the word ' damages ' in a private enabling statute will be sufficient to give to a claimant the right to interest against the Government whenever interest would be allowed as damages in like circumstances if the claim had arisen between private parties." (Pet. Brief, p. 6.) The care which he displayed elsewhere in the opinion negatives the suggestion that so important an exception would be hidden within language so general and illustrated by an example so inept.

II

THE STATUTE DOES NOT AUTHORIZE ALLOWANCE OF INTEREST

(*a*) ***The language used in this and many similar Acts has received a settled construction by the courts and the executive departments, as excluding interest, and Congress has repeatedly evidenced its approval and acquiescence***

During a long period of years Congress has passed many private Acts such as this. Counsel for the petitioner concede that during the last fifteen years there have been ninety-six of them.

"comparable in phraseology to that here in question" (Brief, pp. 16–17)—and there have been numerous others. In the Appendix there are listed about seventy such statutes, enacted during the present century, which may be considered as representative of the whole number, with citations and references to enlightening incidents in their legislative history.

From the very first, and almost without exception, the District Courts, in case after case, have interpreted them as excluding interest. Their conclusions respecting the intent of Congress accord with the conclusions of the Secretary of the Navy, the Secretary of the Treasury and other executive officers when adjusting small claims of similar nature under power conferred by general statutes, and are in harmony with the policy of the Government, both generally and in this particular class of cases—unmistakably declared in the statute authorizing the district courts to hear and determine claims arising out of collisions with public vessels since April 6, 1920. (See pp. 7–9, *supra*).

Very few of these cases have been reported, even where well-reasoned opinions have been handed down, as in *Nippon Yusen Kabushiki Kaisha* v. *United States* (copied, in part, in the Appendix). One apparent reason for this is that the matter has been thought beyond the field of controversy; the judges have not usually deemed it necessary to expound upon it; authors and compilers have uniformly accepted the principle without question.

Benedict on Admiralty (5th ed.), Sec. 419; Sutherland on Damages (4th ed.), Sec. 1294 (v. 5, p. 5013); 1 Corpus Juris 1363, etc., etc. There has been no need for the cumulative evidence of a great number of additional unappealed decisions of District Courts.

They are all available on the records of those courts and of the executive departments. It is believed, however, that reference to the information contained in the Appendix, as well as to the following cases, will be sufficient to indicate what the practice has been. *Watts* v. *United States* (S. D. N. Y., 1904), 129 Fed. 222, 226; *Pennell* v. *United States* (D. C. Maine, 1908), 162 Fed. 75, 76, *et seq.*; *Nantasket Beach Steamboat Co.* v. *United States* (D. C. Mass., 1924), 297 Fed. 656; *Whitelaw* v. *United States* (Behring Sea Case, N. D. Calif., 1925), 9 F. (2d) 103, 104; *Nippon Yusen Kabushiki Kaisha* v. *United States* (E. D. N. Y., 1926—not reported; see Appendix); *Long Island R. R. Co.* v. *United States* (E. D. N. Y., 1926—opinion, denying interest, not reported, but summarized in 1926 A. M. C., p. 1011; and see *infra*); *New York & Cuba Mail S. S. Co.* v. *United States* (S. D. N. Y., 1924, disallowing interest without comment), 300 Fed. 827, reversed in 16 F. (2d) 945; *Commonwealth & Dominion Line Ltd.* v. *United States* (E. D. N. Y., 1926—short opinion denying interest, not reported), reversed in part in 20 F. (2d) 729, now pending in this Court on writ of certiorari; *Alaska Commercial Co.* v. *United*

States (N. D. Calif., 1925—explanation of Judge Kerrigan, *infra*, p. 24); and also, of course, the opinions below in this case.

Watts v. *United States*, although dealing with a statute (copied in Appendix) worded somewhat differently from most of them, has been much relied upon for nearly twenty-five years. The ruling therein on the question of interest was announced in this language:

> It is contended that the disallowance of interest is unjust and excludes the libellants from a full recovery of the damages sustained. Such appears to be the fact. Without interest, the recovery is only partial but it is too well established to admit of argument that the Government is not liable for interest on damage claims in the absence of an express statutory provision or stipulation covering it.
>
> * * * * *
>
> The claimants here, while conceding that if the matter had been referred by Congress to the Court of Claims, interest would not be recoverable, urge that as it has been sent to an admiralty court, which ordinarily allows interest as part of the damages, interest should be granted. The question turns upon the intention of Congress. It would seem that under the authorities cited, interest is not allowable, unless expressly provided for, and there being a complete absence of any allusion to interest in the Act, under which the action has been tried here, it should not be granted.

The late, and seemingly well-considered (although unreported), opinion in *Nippon Yusen Kabushiki Kaisha* v. *United States*, *supra*, declared:

> I am not convinced that by the use of the words "upon the same principles and measures of liability," Congress showed its intention to overrule its general policy on the subject of not allowing interest unless specifically provided. . . .
>
> A distinction between damages and interest exists (*The Scotland*, 118 U. S. 507), in which case, at page 518, Mr. Justice Bradley, writing for the Court, says: "The allowance of interest on damages is not an absolute right."
>
> Therefore, by the use of the words, "principles and measures of liability," Congress did not show any intent to increase the power which it had conferred on this Court "to enter a judgment or decree for the amount of such damage and costs," so as to allow interest on such damages, and however strongly may it appeal to this Court that the case at bar is one in which interest might, under ordinary conditions, properly be allowed, it does not seem to me that Congress, by the Enabling Act, *supra*, conferred upon this Court power to make an award of interest from the date of collision to the date of the entry of the decree herein.

Congress, with undoubted knowledge of the construction thus placed, has, through a long period of years, continued to use the same language, time after time, often under circumstances utterly incon-

sistent with the theory that it contemplated allowance of interest.

Frequent effort has been made in Congress to add the words, "including interest," to particular Acts so that recovery should be authorized, "*not only for the damage, but for the interest on the damage.*" (See Appendix.) In four instances, upon consideration of the merits, the words were added and the parties permitted to recover interest. In many more instances, however, it will be noticed that Congress refused to add the words or, where they had been inserted, to permit them to remain in the bill. Sometimes, it will be noticed, the Senate and House were divided on the question of their retention. The proceedings indicate beyond question that these deliberations were not founded upon any question of style or grammatical propriety, but upon the consideration of whether or not, in fact, interest in the particular case should be allowed; and the courts have so concluded. See, for example, the following paragraph from Judge Campbell's opinion in *Long Island R. R. Co.* v. *United States* (E. D. N. Y., June 2, 1926, not reported, but summarized in 1926 A. M. C., p. 1011):

> A further reason for denying interest may be found, if a further reason be necessary, because it appears that the bill in the suit at bar, as reported to Congress, included a provision for interest, and that the bill was amended in the House of Representatives by striking out the words "including interest" after the word "damages."

There can be no room for doubt that Congress acquiesced in and adopted the construction placed on such statutes by the district courts, which thus became a part of the law. *Case of the Sewing Machine Companies*, 18 Wall. 553, 584; *United States* v. *Merriam*, 263 U. S. 179, 187, and cases there cited.

If, on the other hand, we accept petitioner's view, the proceedings in Congress become meaningless; the insertion of the words, "including interest," was mere tautology.

But it would be quite too much to believe that the various district courts, during a long period of years, would almost uniformly misinterpret the same language in so many cases and, yet, that Congress with undoubted knowledge thereof would continue to use that language time after time, without change and (so far as we have been able to find) without a single suggestion of disapproval, even from individual members intent upon obtaining interest for constituents in particular cases.

If there could be any doubt of the intention of Congress, its understanding of the language repeatedly used, and its asquiescence in the construction long placed on these statutes by the district courts and executive departments, it would seem to be set at rest by the course adopted after the decision in *New York & Cuba Mail S. S. Co.* v. *United States*, 16 F. (2d) 945, in which for the first time an appellate court decided that the language theretofore usually employed contemplated allowance

of interest. That decision was announced on January 10, 1927. On February 24, 1927, c. 190, 44 Stat. pt. 3, 1790, an Act was passed "for the relief of Delaware River Towing Line," owner of a tugboat damaged in collision with a public vessel of the United States prior to the effective date of the relief granted in the Act of March 3, 1925, *supra*. The District Court, Eastern District of Pennsylvania, "sitting as a court of admiralty and acting under the rules governing such court," was empowered to hear and determine the claim and to render judgment or decree for the amount of the damages and costs—

> upon the same principles and measures of liability as in like cases between private parties and with the same rights of appeal *except that no interest shall be allowed on any claim.* (Italics supplied.)

A number of such Acts, then under consideration and in various stages of legislative approval (some already having passed one house), were promptly amended, on the floor or in committee, so as expressly to negative any idea that the general language contemplated interest. (See, for example, Cong. Rec., v. 68, pt. 4, p. 3995, Feb. 16, 1927; House Repts. 1993, 1994, 1997, 1999, 2060, 2063; Sen. Repts. 1682, 1683—all 69th Cong., 2d Sess.) And every one thereafter passed has been so worded (see Appendix), save in one instance—the Act of March 3, 1927, c. 468, 44 Stat. pt. 3, 1839, 1840, authorized a judgment or decree, "*including inter-*

est and costs." The apparent reason for this exception is indicated by Sen. Rept. 1638, 69th Cong., 2d Sess.—a delay of more than ten years was attributable to the Government itself and Congress accepted the responsibility.

(*b*) *If we ignore the construction placed upon these statutes as a whole, and test the isolated words and phrases thereof by general principles, as petitioner has done, even then they do not contain language sufficient to include interest*

In the first place, we must accept the principle that there is a distinction between damages and interest, allowance of which is a matter of discretion and dependent upon the circumstances of each case. The Scotland, 118 U. S. 507, 518, 519—

> The allowance of interest on damages is not an absolute right. Whether it ought or ought not to be allowed depends upon the circumstances of each case, and rests very much in the discretion of the tribunal which has to pass upon the subject, whether it be a court or a jury. * * * *In affirming a decree in admiralty in this court, if interest is not expressly allowed, it is not included.* (Italics supplied.)

And, to the same effect, see *The Maggie J. Smith*, 123 U. S. 349, 356; *The Albert Dumois*, 177 U. S. 240, 255; *Eastern S. S. Corp* v. *Great Lakes Dredge, etc., Co.*, 256 Fed. 497, 505; 1 Corpus Juris 1362, and cases cited.

No authority cited by petitioner rejects this rule; some expressly declare it; and their cumulative effect is, not that "interest is to be awarded," but that it *may* be awarded (between private parties).

The Umbria, 166 U. S. 404, 421, did not consider whether or not interest *should* be allowed, but held that recovery was "limited to the value of the vessel, with interest thereon," etc.—that "probable profits of a charter party" should not be allowed—which was the real issue.

But it is only necessary to quote from the authorities cited by petitioner. (Brief, pp. 7-12.)

Sutherland on Damages (4th ed.):

> SEC. 1290. * * * While the measure of damages for loss of a vessel is, in the first instance, the market value, in the absence of a market for such type of vessel the damages are to be ascertained by deducting the amount of depreciation from the original cost. * * *
>
> SEC. 1294. * * * Interest on the value of the vessel or cargo is recoverable from the date of the casualty, unless there is a recovery on some other basis than that of the value of the lost property. It is said, however, that the recovery of interest is a matter of discretion. * * *

Benedict on Admiralty (5th ed.), SEC. 419:

> The allowance of interest on damages in cases of collision, or other unliquidated damages, is always in the discretion of the court * * *.

Roscoe on Damages in Marine Collisions (2d ed.), p. 105 (note):

> It should therefore be considered that [in the United States] interest will be allowed according to the discretion of the Court in relation to particular uses and that there is no definite rule on the subject.

The Reno, 134 Fed. 555, 556:

> The damages sustained by the owner of a vessel which is sunk in a collision, when the vessel is a total loss, is her value at the time of the loss, to which interest may be added to afford complete indemnity.

The Kate (1899), Prob. Div. 165, 175:

> If the vessel be under charter it appears to me that a case arises in which the profits under the charter party should take the place of interest, as more accurately representing the loss to the owner. * * * The proper measure of damage in this case is the value of the vessel at the end of her voyage, plus the profits lost under the charter party, and this is what the learned registrar has allowed.

The Rhode Island, 20 Fed. Cas. 636, 638:

> In adopting, in this instance, interest or a percentage on the value of the boat for the time she was kept out of the libellant's use by means of the collision, I do not assume to lay that down as a particular always to be admitted in determining the damages occasioned by a wrongful collision. I regard it, in the present instance, as a reasonable mode of compensating the party for what is a posi-

> tive loss to him, and as one which avoids the vague and objectionable valuation of the probable earnings of the boat, had she not been so prevented following her usual employment.

The discretion existing, it can hardly be said that "damages" necessarily includes interest, even as respects private litigants; and it would seem to make little difference whether or not, as suggested (Pet. Brief, p. 10), interest is usually allowed. Possibly the same would be true at law, as, in fact, petitioner urges it is. (Brief, pp. 7, 13.) Are we to infer, then, that the term, "damages," always includes interest, even in nonmaritime matters; that its use in Sec. 24, Jud. Code as amended (U. S. C. Title 28, Sec. 41 (20)), authorizes the district courts to award interest against the United States in all *ex contractu* claims not exceeding $10,000?

Seeking to avoid application of the maxim, *expressio unius est exclusio alterius*, petitioner argues (Brief, p. 14), that "damages" does not include costs. Roscoe, *id.* pp. 64–65, declares costs to be affected by the same considerations applicable to interest and to be comprehended within the rule of *restitutio in integrum*—

> It has been the practice in the Admiralty Registry to allow the taxed costs of the plaintiff and the costs of the defendant (plaintiff in collision action) as between solicitor and client as damages. * * *

[Note] Probably the same rule generally prevails in the United States.

Petitioner inquires (Brief, p. 14): "Can it be supposed that Congress gave this trifle [costs] yet withheld what is essential to a just and full reparation?" It is necessary only to refer to Secs. 152 and 177, Jud. Code (U. S. C. Title 28, Secs. 258, 284), one of which expressly authorizes costs to suitors in the Court of Claims and the other expressly forbids allowance of interest—indicative of the general policy.

Courts of Admiralty, it is said, are governed by equitable principles (Pet. Brief, p. 10) and award interest in order to accomplish "a full and complete indemnity." It has been decided, however, that even express authorization of adjudication on equitable principles is not sufficient to authorize allowance of interest against the Government. *Tillson v. United States*, 100 U. S. 43, 46; *United States v. Omaha Indians*, 253 U. S. 275, 283; 7 Op. Atty. Gen. 523, 524–526.

As a further distinction between the present case and those cited by petitioner, it may be pointed out that the award of interest on the principal amount of the damage presupposes the existence of a legal obligation from the time of the happening and the withholding by the defendant of a sum of money which (legally) "ought to have been paid to the claimant, and [the defendant] having therefore been able to receive interest upon it, ought to be held to have received it for the person to whom the

principal was payable." Sir Charles Butt in *The Kong Magnus* (1891), Prob. Div. 223, 235. In the case of a claim against the Government, however, until Congress has acted and liability has been established as directed by law, there is no legal obligation existent. *United States* v. *Sherman*, 98 U. S. 565, 567—

> Before that time, the government is under no obligation, and the Secretary of the Treasury is not at liberty to pay. When the obligation arises, it is an obligation to pay the amount recovered; that is, the amount for which judgment has been given. The act of Congress says not a word about interest. Judgments, it is true, are by the law of South Carolina, as well as by Federal legislation, declared to bear interest. Such legislation, however, has no application to the government. And the interest is no part of the amount recovered. It accrues only after the recovery has been had. Moreover, whenever interest is allowed either by statute or by common law, except in cases where there has been a contract to pay interest, it is allowed for delay or default of the debtor. But delay or default cannot be attributed to the government. * * *
>
> * * * It cannot be admitted that the plaintiff, at his option, may impose upon the United States a liability to pay interest, as long as he pleases, upon a sum of money that, during all the time in which the interest accrues, the government was not bound to pay.

And interest, usually insignificant in comparison with the principal sum claimed, would sometimes assume alarming proportions in claims against the Government. Note, for example, *Pennell* v. *United States*, 162 Fed. 75, where forty-two years' interest was claimed. Congress is perhaps the best judge of the responsibility for such delay, and, where the Government has been clearly at fault, has at times expressly authorized allowance of interest. (See instances indicated in the Appendix.)

(c) *The recent cases in the Second Circuit allowing interest are not well considered, and represent conspicuous departures from the accepted view*

Of the cases referred to by petitioner (Brief, pp. 21–22), as allowing interest, *The Friedrich der Grosse*, 1926, A. M. C. 361, and *Texas Co.* v. *United States*, 11 F. (2d) 981, affirmed in 16 F. (2d) 948, are the same case reported under different names. The opinion in *Alaska Commercial Co.* v. *United States*, 1925, A. M. C. 1269, did originally contain the words, "with interest and costs." Attention is invited, however, to the following communication addressed to Government counsel by Judge Kerrigan, May 18, 1925:

> In preparing my memorandum opinion in the case of *Alaska Commercial Co.* v. *United States of America*, I inadvertently overlooked the fact that interest was under the terms of the statute in question not allowed. Hence, I have stricken from the face of the opinion as filed the word "interest."

A certified copy of the decree shows that interest was not awarded.

This leaves for us to consider, only *The Commonwealth*, 297 Fed. 651; *New York & Cuba Mail S. S. Co.* v. *United States*, 16 F. (2d) 945; *Texas Co.* v. *United States; and Commonwealth & Dominion Line, Ltd.* v. *United States*, 20 F. (2d) 729, (now pending in this Court on writ of certiorari)—all in the Second Circuit. The two last mentioned followed *New York & Cuba Mail S. S. Co.* v. *United States*, in the Circuit Court of Appeals, without further discussion. *The Commonwealth* did not reach the Circuit Court of Appeals because, for reasons not connected in any way with the question of interest, the case was settled out of court and the appeal abandoned.

Pursuant to "An Act for the relief of the New England Steamship Company," February 20, 1914, c. 25, 38 Stat. 1244, which provided for initial action by the United States, the latter libeled the Steamship *Commonwealth* to recover damages resulting from a collision between that vessel and the battleship *New Hampshire*. By authority of the same Act, the owner of the *Commonwealth* filed a cross libel to recover its damages. Both claimed interest. The court, devoting but a few meager sentences to the question of interest, announced its holding in the following language:

> The Private Act does not regulate merely the action by the New England Steamship Company; it expressly covers both actions;

> it provides for judgment or decree either for or against the United States upon the same principles and measure of liability as in like cases in admiralty between private parties.
>
> Concededly, if both were private parties, interest would be allowed; the United States asserts its right to interest, but it denies the counter right. In my judgment, if the United States is entitled to interest, then under the fair construction of the act, a similar right is given to the other party. That the United States is so entitled has not been and cannot be denied.

Thus, while the proceeding was instituted under and in accordance with the direction of the private Act, which did not provide for interest, the court assumed, without question, that the United States would be entitled thereto—giving no thought to the possible exclusiveness of the remedy so provided or the effect upon general principles otherwise applicable—and then made this assumption the basis of its holding that "if the United States is entitled to interest * * * a similar right is given to the other party."

The foregoing decision was by Judge Mack. In *New York & Cuba Mail S. S. Co.* v. *United States*, 300 Fed. 827, District Judge Winslow declined to follow it, and disallowed interest without comment. In *Texas Co.* v. *United States*, 11 F. (2d), 981, Judge Goddard allowed interest. He held that if the United States, under the private Act, may demand damages it is entitled to interest, and that if it had

a right to claim interest, then, regardless of whether it did or not, the private libelant might do so.

And this, it will be remembered, is based upon a mere assumption of a district judge on a proposition which was not controverted before him. Whether or not the United States when proceeding under such an Act, is entitled to interest, would seem in itself a question worthy of consideration. If it may demand interest, it does not necessarily follow that the private libelant may do so. *United States* v. *Verdier*, 164 U. S. 213, 218; *United States* v. *North American Co.*, 253 U. S. 330, 336.

The Circuit Court of Appeals, Second Circuit, reversing the decision of Judge Winslow and affirming that of Judge Goddard, awarded interest in both cases. It recognized the need of statutory authority, but thought this might be inferred from the intention (which it professed to find) that the principle of *restitutio in integrum* should apply.

The Nuestra Senora de Regla, 108 U. S. 92, 104; *The Paquete Habana*, 189 U. S. 453, 467; and *United States* v. *The Thekla*, 266 U. S. 328, 340, 341, were cited. As hereinafter pointed out, these were adversary proceedings instituted by or for the benefit of the United States, which thus "voluntarily submitted themselves to the court," with no statute defining and limiting the extent of such submission; and in all the facts and applicable principles were altogether different from those here under consideration.

Seaboard Air Line Ry. Co. v. *United States*, 261 U. S. 299, also cited, is helpful only as laying down the general rule. The exception there found applicable, that interest may be allowed as part of the "just compensation" awarded for private property taken, is explained by this excerpt from the opinion (p. 304):

> Just compensation is provided for by the Constitution and the right to it cannot be taken away by statute. Its ascertainment is a judicial function.

But the chief fault of the opinion in *New York & Cuba Mail S. S. Co.* v. *United States* is that it gave no consideration whatever to the long series of similar private Acts, the policy of Congress as manifested by those Acts and general legislation, and its long-continued acquiescence in and reliance upon the judicial construction placed upon the language used time after time, often under circumstances inconsistent with the theory that allowance of interest was intended. In fact, it is apparent, as suggested below, that the court was not fully and properly advised concerning them.

(d) Other authorities cited by petitioner have dealt with principles altogether different from those here applicable

The Charming Betsy, 2 Cranch 64. Captain Murray of the U. S. Frigate *Constellation* was held personally liable for a tortious seizure as prize of war. Interest was allowed without discussion. The

report contains a footnote to the effect that Captain Murray was later reimbursed by Act of Congress.

The Anna Maria, 2 Wheat. 327, 335, and *The Amiable Nancy*, 3 Wheat. 546, 560, concerned liability arising out of tortious seizures by privateers owned by American citizens. There is no discussion respecting allowance of interest, and it does not appear what, if any, interest the United States had in the result—the captures being unlawful.

The Nuestra Senora de Regla, 108 U. S. 92, 104; *The Paquete Habana*, 189 U. S. 453, 467; *The Lubuan*, Blatchford's Prize Cases, 165, and *The Sybil*, *id.* 615, concerned vessels unlawfully seized and libeled in the name of the United States as prizes of war. It would seem that primarily the responsibility would be that of the officers who acted without authority of law, as in the case of Captain Murray, in *The Charming Betsy*, *supra*. However, it appears that the United States "voluntarily submitted themselves to the court," with no statute defining the extent of such submission or limiting the right of the court to award interest. In the first mentioned case it appears interest was awarded. In *The Paquete Habana* the Court mentioned, among other details, as proving the findings were not justified, that "interest was charged at eight per cent, there being no reason apparent for charging more than six if interest was allowed." The reported opinions in the other two cases make

no reference to interest. In fact, in none of them was the question expressly considered, nor is there any indication that it was an issue.

> Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents. [*Webster* v. *Fall*, 266 U. S. 507, 511.]

As indicated by petitioner, international usage may have affected the matter in some way.

Erskine v. *Van Arsdale*, 15 Wall. 75, was an action against a public officer for money illegally exacted as taxes. The judgment was against the officer personally for a tort committed by him, and the fact that the United States would probably pay the amount of the judgment did not affect the measure of damages. *The Apollon*, 9 Wheat. 362, 377, was a proceeding against a Customs Officer for an unlawful seizure and involved the same principles.

Miller v. *Robertson*, 266 U. S. 243, 257, while recognizing the principle of *Banco Mexicano* v. *Deutsche Bank*, 263 U. S. 591, 603, that a suit against the Alien Property Custodian is, in effect, against the United States, nevertheless allowed interest. The Court carefully pointed out, however, that—

> the claim was not against it [the United States]. No debt was alleged to be owing from it to the plaintiff. The rule of sovereign immunity from liability for interest • • • does not apply.

Standard Oil Company v. *United States*, 267 U. S. 76, 79, allowing interest, is explained by this sentence from the opinion:

> When the United States went into the insurance business, issued policies in familiar form and provided that in case of disagreement it might be sued, it must be assumed to have accepted the ordinary incidents of suits in such business.

United States v. *Rogers*, 255 U. S. 163, 169; *Seaboard Air Line Ry. Co.* v. *United States*, 261 U. S. 299, 306; *Brooks-Scanlon Corp.* v. *United States*, 265 U. S. 106, 123; *Liggett & Myers Tobacco Co.* v. *United States*, 274 U. S. 215, 220; *Phelps* v. *United States*, *id.*, 341, 344; and *Compagnie Generale Transatlantique* v. *United States of America* (Hull No. 5), —— Ct. Cls. —— (February 14, 1927), 1927 A. M. C. 485, were proceedings to recover the "just compensation" guaranteed by the Constitution for private property taken for public use. They recognize a difference between proceedings to recover "just compensation" and an ordinary demand or claim against the Government.

United States v. *The Thekla*, 266 U. S. 328, 340, 341, [followed in *The Barendrecht*, 11 F. (2d) 377] involved cross libels arising out of a collision with a vessel owned by the United States *pro hac vice* and operated through the United States Shipping Board Emergency Fleet Corporation—which the Court declared might be held liable for interest.

The petitioner relies upon the general language contained in the latter part of the following sentence—but refrains from quoting the first part, which seems to indicate a distinction between that case and this:

> The reasons that have prevailed against creating a government liability in tort do not apply to a case like this, and on the other hand the reasons are strong for not obstructing the application of natural justice against the government by technical formulas when justice can be done without endangering any public interest.

United States v. *McKee*, 91 U. S. 442, 450. A claim for money and supplies furnished troops during the Revolutionary War was referred to the Court of Claims with direction that—

> In making such adjustment and settlement, the said court shall be governed by the rules and regulations heretofore adopted by the United States in the settlement of like cases.

The claim was one of the class provided for by the Act of August 5, 1790, c. 38, 1 Stat. 178, 179, expressly allowing interest, and would have been brought thereunder except that the period of limitation had run.

CONCLUSION

It is respectfully submitted that the conclusion of the Circuit Court of Appeals is required by the language of this Act, standing alone, when read in the

light of accepted canons of construction; is in accord with the evident intention of Congress not to allow interest in these collision cases (save in exceptional instances upon consideration of the merits), as evidenced by numerous authoritative declarations; and is in harmony with the almost uniform holdings of the district courts when construing many similar private Acts during a long period of years, acquiesced in and relied upon by Congress when using the same language time after time, often under circumstances repugnant to any idea that allowance of interest was contemplated.

The decree of the Circuit Court of Appeals should be affirmed.

WILLIAM D. MITCHELL,
Solicitor General.
GEORGE R. FARNUM,
Assistant Attorney General.
JOHN T. FOWLER, JR.,
Attorney.

FEBRUARY, 1928.

APPENDIX A

LIST OF ACTS FOR RELIEF OF PRIVATE OWNERS ON ACCOUNT OF DAMAGES SUSTAINED THROUGH COLLISIONS WITH PUBLIC VESSELS

This list does not include all such statutes. It contains all of those (about thirty-five) under which decrees have been entered against the United States and paid, without interest, during a period of twenty years (1906–1926), and a number of others, including particularly those Acts which have come to attention and seem pertinent because construed in the cited cases, because expressly allowing or denying interest, or because of enlightening incidents in their legislative history. The records of the Treasury Department (which has supplied the information respecting payments) indicate that in four instances the decrees included interest, not expressly authorized; in three of these the parties accepted payment without interest and waived any claim thereto.

Except where indicated the statute contains no reference to interest. In some, as pointed out, the bill read, "including interest," but the words were stricken out by amendment.

Mar. 2, 1901, c. 824, 31 Stat. 1789.

The bill, worded, "including interest," passed the Senate. The House eliminated those words by amendment and the Senate concurred. House Rept. 723, 56th Cong. 1st Sess.; see *Watts* v. *United States*, 129 Fed. 222, 228.

May 27, 1902, c. 887, 32 Stat. 207, 242.

Mar. 4, 1909, c. 334, 35 Stat. 1622.

Feb. 20, 1914, c. 25, 38 Stat. 1244.
Apr. 26, 1916, c. 87, 39 Stat. 1261.
Aug. 9, 1916, c. 312, 39 Stat. 1353.

The bill originally read, "damages, interest, and costs." The Secretary of the Navy reported—

> It has been the general practice of the Congress in bills of this character not to allow interest against the United States. It is accordingly suggested that the word "interest" * * * be stricken out.

This was done by amendment. Sen. Rept. 616; Cong. Rec. v. 53, pt. 10, p. 9532, 64th Cong. 1st Sess.

Aug. 21, 1916, c. 391, 39 Stat. 1393.

Attorney for the claimant urgently insisted, because of the circumstances, "that if ever there was a case in which interest should be allowed this is such a case," and that recovery should be authorized—

> not only for the damage, but for the interest on the damage.

The Secretary of the Navy recommended passage of the bill, which read "including interest." On recommendation of the Committee, however, Congress eliminated these words by amendment. House Rept. 620; Cong. Rec. v. 53, pt. 10, p. 9418, 64th Cong. 1st Sess.

Feb. 14, 1917, c. 65, 39 Stat. 1474.
Dec. 31, 1919, c. 36, 41 Stat. 1457.
Mar. 30, 1920, c. 114, 41 Stat. 1461.
Apr. 16, 1920, c. 148, 41 Stat. 1467.
Apr. 16, 1920, c. 149, 41 Stat. 1467.
May 6, 1920, c. 169, 41 Stat. 1469.
June 5, 1920, c. 283, 41 Stat. 1521.

June 5, 1920, c. 284, 41 Stat. 1521.
Dec. 26, 1920, c. 5, 41 Stat. 1523.
Mar. 3, 1921, c. 144, 41 Stat. 1553.
Mar. 3, 1921, c. 145, 41 Stat. 1553.
Aug. 9, 1921, c. 59, 42 Stat. 1565.
Nov. 17, 1921, c. 127, 42 Stat. 1569.
Feb. 18, 1922, c. 61, 42 Stat. 1578.
Feb. 18, 1922, c. 62, 42 Stat. 1578.
Apr. 28, 1922, c. 163, 42 Stat. 1587
May 15, 1922, c. 191, 42 Stat. 1589.
May 15, 1922, c. 192, 42 Stat. 1590.
May 15, 1922 c. 193, 42 Stat. 1590.
Sept. 18, 1922, c. 333, 42 Stat. 1602.
Feb 26, 1923, c. 133, 42 Stat. 1774.
Feb 26, 1923, c. 134, 42 Stat. 1775.
Feb. 26, 1923, c. 135, 42 Stat. 1776.
Feb. 26, 1923, c. 136, 42 Stat. 1776.
Feb. 26, 1923, c. 137, 42 Stat. 1777.
Feb. 26, 1923, c. 138, 42 Stat. 1777.
Feb. 27, 1923, c. 143, 42 Stat. 1778.
Feb. 28, 1923, c. 153, 42 Stat. 1778.
Mar. 2, 1923, c. 201, 42 Stat. 1786.
Mar. 2, 1923, c. 206, 42 Stat. 1787.
Apr. 12, 1924, c. 100, 43 Stat. 1361.
May 19, 1924, c. 159, 43 Stat. 1364.

The words, "including interest," originally inserted in the bill were stricken out by amendment. Cong. Rec. v. 65, pt. 5, p. 4686, 68th Cong. 1st Sess.

June 3, 1924, c. 245, 43 Stat. 1369.
"Including interest."
June 3, 1924, c. 246, 43 Stat. 1370.
June 3, 1924, c. 247, 43 Stat. 1370.
June 7, 1924, c. 280, 43 Stat. 1374.
"Including interest."

Jan. 28, 1925, c. 105, 43 Stat. 1547.

Jan. 28, 1925, c. 107, 43 Stat. 1547.

Feb. 7, 1925, c. 160, 43 Stat. 1555.

Feb. 16, 1925, c. 237, 43 Stat. 1563.

The words, "including interest," originally inserted in the bill, were stricken out by amendment. Cong. Rec., v. 66, pt. 4, p. 3458, 68th Cong., 2d Sess.

Feb. 16, 1925, c. 238, 43 Stat. 1564.

The words, "including interest," originally inserted in the bill, were stricken out by amendment. Cong. Rec., v. 66, pt. 4, p. 3458, 68th Cong., 2d Sess.

Feb. 16, 1925, c. 239, 43 Stat. 1564.

The bill, worded "including interest," passed the Senate. The House eliminated those words by amendment and the Senate concurred. Cong. Rec., v. 66, pt. 4, pp. 3459, 3537, 68th Cong., 2d Sess. Note the following explanation in the Senate of the House amendment:

> Mr. UNDERWOOD. Mr. President, there are three bills from the House of the same nature on the desk, with the same amendment, which reduces the amount the claimant is to receive. I ask that they may receive immediate consideration. * * * As the bills passed the Senate they allowed interest. The House strikes out the allowance of interest and reduces the amount. [Cong. Rec. v. 66, pt. 4, p. 3537, 68th Cong. 2d Sess.]

Feb. 16, 1925, c. 240, 43 Stat. 1565.

Feb. 16, 1925, c. 244, 43 Stat. 1567.

Feb. 16, 1925, c. 246, 43 Stat. 1568.

Feb. 16, 1925, c. 251, 43 Stat. 1571.

The bill, worded "with interest," passed the Senate. The House eliminated those words by amend-

ment and the Senate concurred. Cong. Rec. v. 66, pt. 4, pp. 3463, 3491, 68th Cong. 2d Sess.

Feb. 28, 1925, c. 380, 43 Stat. 1581.

Mar. 3, 1925, c. 504, 43 Stat. 1589.

"Including interest." The House had amended the bill so as to eliminate these words, but the Senate declined to concur, and they were retained. Cong. Rec. v. 66, pt. 5, p. 4834, 68th Cong. 2d Sess.

May 1, 1926, c. 213, 44 Stat. pt. 3, 1464.

May 7, 1926, c. 270, 44 Stat. pt. 3, 1470.

> Mr. KING. Do I understand that the interest provision has been stricken out of the bills which have just been passed, so that the judgments shall not bear interest?
>
> Mr. CORTLAND [who had reported the measures]. Yes. The words "including interest" were stricken out of the bills. (Cong. Rec. v. 67, pt. 4, p. 4060, 69th Cong. 1st Sess.)

The reference was to the two preceding items, and to several others not here listed. Three had contained the words, "including interest," just eliminated by amendment. Cong. Rec. v. 67, pt. 4, pp. 4058–4060, 69th Cong. 1st Sess.

Feb. 14, 1927, c. 151, 44 Stat. pt. 3, 1773.

Feb. 24, 1927, c. 190, 44 Stat. pt. 3, 1780.

"Except that no interest shall be allowed on any claim."

> Mr. UNDERHILL. Mr. Speaker, I offer the same amendment as will be offered on all these bills. * * * [Add] "except that no interest shall be allowed on any claim." (Cong. Rec. v. 68, pt. 4, p. 3995, Feb. 16, 1927, 69th Cong. 2d Sess.)

Every bill of this character then pending (save one, listed below, expressly allowing interest) was similarly amended, on the floor or in committee, before passage. Cong. Rec. v. 68, pt. 4, pp. 3988, 3995, Feb. 16, 1927; House Repts. 1993, 1994, 1997, 1999, 2060, 2063; Sen. Repts. 1682, 1683—all 69th Cong. 2d Sess. Apparently Congress had in mind the recent decision in *New York & Cuba Mail S. S. Co. v. United States*, 16 F. (2d) 945, construing the language of these Acts as authorizing interest.

Feb. 26, 1926, c. 222, 44 Stat. pt. 3, 1793.

"Except that no interest shall be paid on any claim."

Mar. 3, 1927, c. 409, 44 Stat. pt. 3, 1807.

"Except that no interest shall be allowed on any claim."

Mar. 3, 1927, c. 410, 44 Stat. pt. 3, 1808.

"Except that no interest shall be allowed on any claim."

Mar. 3, 1927, c. 411, 44 Stat., pt. 3, 1808.

"Except that no interest shall be allowed on any claim."

Mar. 3, 1927, c. 437, 44 Stat. pt. 3, 1829.

"Except that no interest shall be allowed on any claim."

Mar. 3, 1927, c. 438, 44 Stat. pt. 3, 1830.

"Except that no interest shall be allowed on any claim."

Mar. 3, 1927, c. 447, 44 Stat. pt. 3, 1833.

Specific sum appropriated as "the total cost of repairing the damages." This did not include interest. House Rept. 1804, 69th Cong. 2d Sess.

Mar. 3, 1927, c. 468, 44 Stat. pt. 3, 1839.

"Including interest and costs." The apparent reason for this exception is indicated by Sen. Rept.

1638, 69th Cong. 2d Sess.—a delay of more than ten years was attributable to the Government itself and Congress accepted the responsibility.

Mar. 4, 1927, c. 521, 44 Stat. pt. 3, 1846.

"Except that no interest shall be allowed on any claim."

APPENDIX B

TEXT OF PRIVATE ACTS CONSTRUED IN REPRESENTATIVE CASES

An Act Authorizing the owners of the steamship Texas to bring suit against the United States of America

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the claim of the owners of the steamer Texas arising out of a collision between said steamer and the United States steamer Frederick der Grosse, off Tompkinsville, Staten Island, in the harbor of New York, on the 3d day of September, 1917, for and on account of the losses alleged to have been suffered in said collision by the owners of said steamer Texas by reason of damages to and detention of said steamer may be submitted to the United States District Court for the Southern District of New York, under and in compliance with the rules of said court sitting as a court of admiralty; and that the said court shall have jurisdiction to hear and determine the whole controversy and to enter judgment or decree for the amount of the legal damages sustained by reason of said collision, if any shall be found to be due either for or against the United States, upon the same principle and measure of liability, with costs, as in like cases in admiralty between private parties, with the same rights of appeal: *Provided*, That such notice of the suit shall be given to the Attorney General of the United States as may be provided by order of the said court, and it shall be

the duty of the Attorney General to cause the United States attorney in such district to appear and defend for the United States: *Provided further*, That said suit shall be brought and commenced within four months of the date of the passage of this Act. (Act of November 17, 1921, c. 127, 42 Stat. 1569.—construed in *Texas Co. v. United States*, 16 F. (2d) 948.)

An Act For the relief of the owners of the steamship Esperanza

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the claim of the New York and Cuba Mail Steamship Company, owner of the American steamship Esperanza, against the United States for damages alleged to have been caused by collision between said vessel and the United States destroyer Connor on the 15th day of February, 1918, off Barnegat Light, New Jersey, may be sued for by the owner of the said American steamship Esperanza in the United States District Court for the Southern District of New York, sitting as a court of admiralty, and acting under the rules governing such court, and said court shall have jurisdiction to hear and determine such suit and to enter a judgment or decree for the amount of such damages and costs, if any, as shall be found to be due against the United States in favor of the owner of the said American steamship Esperanza, or against the owner of the said American steamship Esperanza, in favor of the United States, upon the same principles and measures of liability as in like cases in admiralty between private parties, and with the same rights of appeal: *Provided*, That such notice of the suit shall be given to the Attorney

General of the United States as may be provided by order of the said court, and it shall be the duty of the Attorney General to cause the United States attorney in such district to appear and defend for the United States: *Provided further*, That said suit shall be brought and commenced within four months of the date of the passage of this Act. (Act of February 28, 1923, c. 153, 42 Stat. 1778–1779.—construed in *New York & Cuba Mail S. S. Co.* v. *United States*, 16 F. (2d) 945.)

AN ACT For the allowance of certain claims * * * and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled * * *.

That the claim of the owners of the British steamship Foscolia, sunk by collision with the United States steamship Columbia on the evening of May twenty-eighth, eighteen hundred and ninety-eight, near Fire Island light-ship, for and on account of the loss of said vessel and cargo, may be submitted to the United States district court for the southern district of New York, under and in compliance with the rules of said court sitting as a court of admiralty; and said court shall have jurisdiction to hear and determine and to render judgment thereupon: *Provided, however*, that the investigation of said claim shall be made upon the following basis: First, the said court shall find the facts attending the loss of the said Steamship Foscolia and her cargo; and, second, if it shall appear that the responsibility therefor rests with the United States Steamship Columbia, the court shall then ascertain and determine the amounts which

should be paid to the owners, respectively, of the Foscolia and her cargo, in order to reimburse them for the losses so sustained, and shall render a decree accordingly: *Provided further*, That the amounts of the losses sustained by the master, officers, and crew of the Foscolia may be included in such decree.

That should such decree be rendered in favor of the owners of the Foscolia and her cargo, the amount thereof may be paid out of any money in the Treasury not otherwise appropriated. (Act of May 27, 1902, c. 887, 32 Stat. 207, 242—construed in *Watts* v. *United States*, 129 Fed. 222.)

AN ACT For the relief of the owner of the steamer Mayflower

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the claim of the owner of the steamer Mayflower rising out of a collision between said steamer and the United States submarine L–10 in President Roads, Boston Harbor, on the 11th day of August, 1917, for and on account of the losses alleged to have been suffered in said collision by the owner of said steamer Mayflower through damage to said steamer Mayflower, may be submitted to the United States Court for the District of Massachusetts, the district in which said collision occurred, under and in compliance with the rules of said court sitting as a court of admiralty: *Provided*, That the said court shall have jurisdiction to hear and determine the whole controversy and to enter a judgment or decree for the amount of the legal damages sustained by reason of said collision, if any shall be found to be due, either for or against the United States, upon the same principle and measure of lia-

bility with costs as in like cases in admiralty between private parties, with the same rights of appeal: *Provided*, That such notice of the suit shall be given to the Attorney General of the United States as may be provided by order of the said Court, and it shall be the duty of the Attorney General to cause the United States attorney in such district to appear and defend for the United States: *Provided further*, That said suit shall be brought and commenced within four months of the date of the passage of this Act. (Act of May 15, 1922, c. 193, 42 Stat. 1590—construed in *Nantasket Beach S. B. Co.* v. *United States*, 297 Fed. 656.)

AN ACT For the relief of the owners of the steamship Ceylon Maru

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the claim Nippon Yusen Kabushiki Kaisha, owner of the Japanese steamship Ceylon Maru, against the United States of America, for damages alleged to have been caused by collision of Trompeloupe, France, on November 2, 1918, between the said vessel and the American steamship Jeanette Skinner, owned by the United States of America, and being then operated by the War Department in its transport service, may be sued for by the said Nippon Yusen Kabushiki Kaisha in the District Court of the United States for the Eastern District of New York, sitting as a court of admiralty and acting under the rules governing such court; and such court shall have jurisdiction to hear and determine such suit and to enter a judgment or decree for the amount of such damage, and costs, if any, as shall be found to be due

against the United States in favor of said Nippon Yusen Kabushiki Kaisha, or against the said Nippon Yusen Kabushiki Kaisha, in favor of the United States, upon the same principles and measures of liability as in like cases in admiralty between private parties and with the same rights of appeal: *Provided*, That such notice of the suit shall be given to the Attorney General of the United States as may be provided by the order of the said court, and it shall be the duty of the Attorney General to cause the United States attorney in such district to appear and defend for the United States: *Provided further*, That in the suit authorized by this Act any and all of the testimony taken in the suit of Nippon Yusen Kabushiki [Kaisha] against the steamship Jeannette Skinner begun by the filing of a libel in the District Court of the United States for the District of Maryland on March 1, 1919, may be offered by or in behalf of the Government or the owner of the Ceylon Maru and shall be admissible in evidence: *And provided further*, That said suit shall be brought and commenced within four months of the date of the passage of this Act. (Act of February 16, 1925, c. 239, 43 Stat. 1264—construed in *Nippon Yusen Kabushiki Kaisha* v. *United States*.)

APPENDIX C

Unreported Opinion in *Nippon Yusen Kabushiki Kaisha* v. *United States*. (Eastern Dist., N. Y., May 7, 1926.)

CAMPBELL, *D. J.*:

[The opinion covers twenty-one typewritten pages. Only that part printed here deals with the matter of interest.]

But one question remains for further consideration and that is whether, as contended by the libellant, this court, under the special act which conferred jurisdiction upon it to try this case, has power to allow the libellant interest from the date of the collision up to the date of the decree.

If the allowance of interest rests in discretion in the case at bar, the reasons for the exercise of that discretion in libellant's favor are convincing.

The question of the allowance of interest in the case at bar, however, is primarily one of law.

No action could be maintained by the libellant in this court for the recovery of any of the damages alleged in the libel if the United States had not, by the statute cited, *supra*, permitted itself to be sued in this court as provided in that statute.

That statute must be strictly construed and this court cannot go beyond the letter of such consent. (*Schillinger* v. *United States*, 155 U. S. 163, 166, *Reid Wrecking Co.* v. *United States*, 202 Fed. 314, *Reid* v. *United States*, 211 U. S. 529, *United States* v. *Dalcour*, 203 U. S. 408, The Isonomia, 285 Fed. 515.)

It is a well settled principle that the United States is not liable to pay interest on claims against it in the absence of expressed statutory provision to that effect (*Angarica* v. *Bayard*, 127 U. S. 251), in which case Mr. Justice Blatchford, writing for the court, at page 260 said:

> "It has been established, as a general rule, in the practice of the government, that interest is not allowed on claims against it, whether such claims originate in contract or in tort, and whether they arise in the ordinary business of administration or under private acts of relief, passed by Congress on special application. The only recognized exceptions are, where the government stipulates to pay interest and where interest is given expressly by an act of Congress, either by the name of interest or by that of damages."

As a further evidence of the existence of such rule, reference may be made to Section 177 of the Judicial Code which controls the action of the Court of Claims, and reads as follows:

> "SEC. 177. (NO INTEREST ON CLAIMS) No interest shall be allowed on any claim up to the time of the rendition of judgment thereon by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest."

It thus appears that Congress must have expressed its intention to allow interest on the libellant's claim up to the time of the rendition of the decree, or interest must be denied.

Interest is not specifically mentioned in the Enabling Act approved February 16, 1925, under which the suit at bar has been brought, but after describing the claim of the libellant, and conferring jurisdiction on this court sitting as a court of admiralty and acting under the rules governing such court, the said act, in part provides as follows:

> "And such court shall have jurisdiction to hear and determine such suit and to enter a judgment or decree for the amount of such damage, and costs, if any, as shall be found to be due against the United States in favor of said Nippon Yusen Kabushiki Kaisha, or against the said Nippon Yusen Kabushiki Kaisha, in favor of the United States, upon the same principles and measures of liability as in like cases in admiralty between private parties and with the same rights of appeal."

If the suit at bar was between private parties the libellant would, without doubt, be allowed interest. (*The America*, 1 Fed. cases, 285, reversed on other grounds, 92 U. S. 432. *In re Great Lakes Dredge & Dock Co.*, 250 Fed. 916).

The United States if it prevailed would be entitled to interest, but does it follow as a logical consequence that the converse of the proposition is true?

Libellant contend that it is, and cites *The Commonwealth*, 297 Fed. 651, 654, and *Texas Co. v. United States of America*, unreported opinion of Judge Goddard, District Court, Southern District of New York, Admiralty 81-332, January 29, 1926.

I am not convinced that by the use of the words upon the same "principles and measures of liability," Congress showed its intention to overrule its general policy on the subject of not allowing interest unless specifically provided.

Earlier in said Act the jurisdiction of this court is limited as follows:

> "To hear and determine such suit and to enter a judgment or decree for the amount of such damage, and costs, if any, as shall be found to be due against the United States."

A distinction between damages and interest exists (*The Scotland*, 118 U.S. 507) in which case, at page 518, Mr. Justice Bradley, writing for the court, says:

> "The allowance of interest on damages is not an absolute right."

Therefore, by the use of the words "principles and measures of liability," Congress did not show any intent to increase the power which it had conferred on this court "to enter a judgment or decree for the amount of such damage and costs," so as to allow interest on such damages, and however strongly may it appeal to this court that the case at bar is one in which interest might, under ordinary conditions, properly be allowed, it does not seem to me that Congress, by the Enabling Act, *supra*, conferred upon this court power to make an award of interest from the date of the collision to the date of the entry of the decree herein.

I do not think it makes any difference whether or not the United States is claiming interest in the case at bar, as suggested in *Nantasket Beach*

Steamboat Co. v. *United States*, 297 Fed. 656, although if the reasoning of that opinion be accepted, it is exactly in point and justifies the denial of such interest in the case at bar; but my decision is based on the ground that this court is concluded by the Enabling Act, *supra*, and that under that Act this court is not empowered to allow such interest.

○

In the Supreme Court of the United States

OCTOBER TERM, 1927

No. 551

BOSTON SAND AND GRAVEL COMPANY, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the Circuit Court of Appeals for the First Circuit having reference to the question of damages is reported in 19 F. (2d) 744 and appears at page 69 of the Record. The opinion of the District Court relating to damages is reported in 16 F. (2d) 643 and appears at page 50 of the Record.

JURISDICTION

The judgment of the Circuit Court of Appeals denying the petition for rehearing was entered on June 28, 1927 (R. 89). The petition for certiorari was filed September 21, 1927. The jurisdiction of

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CITATIONS

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Special Act of Congress approved May 15, 1922, c. 192, 42 Stat. 1580	3

this Court to issue the writ is found in Section 240 of the Judicial Code as amended by the Act of February 13, 1925.

THE QUESTION PRESENTED

The question presented is whether in libel proceedings against the United States for collision losses in admiralty filed by authority of an Act of Congress conferring jurisdiction on the District Court to enter judgment for damages sustained upon the same principle and measure of liability as in like cases between private parties, interest upon the several items of damages, from the dates of the losses, is recoverable.

STATEMENT

By authority of a Special Act of Congress approved May 15, 1922 (c. 192, 42 Stat. 1590), the libel was filed by the owners of the steam lighter "Cornelia" against the United States, as owner of the destroyer "Bell," to recover damages arising out of collision between the vessels on August 9, 1918. Upon the question of liability, the Circuit Court of Appeals (7 F. (2d) 278), reversing the District Court (298 Fed. 768), which had found in favor of the Government, held both vessels at fault and divided the damages. On proceedings pursuant to the mandate, the District Court entered judgment for the petitioner for $45,542.34, one-half the amount of damages assessed, but without interest. (R. 49.) Appeals were taken by both parties to the United States Circuit Court of Ap-

peals for the First Circuit. That court dismissed the appeal by the owner of the "Cornelia," which asked interest on the damages at 6% from the date of the collision.

THE STATUTE

(C. 192, 42 Stat. 1509)

AN ACT FOR THE RELIEF OF THE OWNER OF THE STEAM LIGHTER "CORNELIA"

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the claim of the owner of the steam lighter Cornelia rising out of a collision between said steam lighter and the United States destroyer Bell in Broad Sound, Boston Harbor, Massachusetts, on the 9th day of August, 1918, for and on account of the losses alleged to have been suffered in said collision by the owner of said steam lighter Cornelia by reason of damages to or the loss of said steam lighter, her boats, engines, boilers, tackle, apparel, furniture, and supplies, may be submitted to the United States Court for the District of Massachusetts, under and in compliance with the rules of said court sitting as a court of admiralty; and that the said court shall have jurisdiction to hear and determine the whole controversy and to enter a judgment or decree for the amount of the legal damages sustained by reason of said collision, if any shall be found to be due either for or against the United States, upon the same principle and measure of liability with costs as in like cases in admiralty be-

tween private parties with the same rights of appeal: *Provided*, That such notice of the suit shall be given to the Attorney General of the United States as may be provided by order of the said court, and it shall be the duty of the Attorney General to cause the United States attorney in such district to appear and defend for the United States: *Provided further*, That said suit shall be brought and commenced within four months of the date of the passage of this Act.

ARGUMENT

The decision of the Circuit Court of Appeals follows the previously accepted decisions of the District Courts in *Watts* v. *United States* (S. D. N. Y. 1904), 129 Fed. 222; *Pennell* v. *United States* (D. C. Maine, 1908), 162 Fed. 75; *Nantasket Beach Steamboat Company* v. *United States* (D. C. Mass. 1924), 297 Fed. 656; *Whitelaw* v. *United States* (N. D. Calif. 1925), 9 F. (2d) 103; *Nippon Yusen Kabushiki Kaisha* v. *United States* (E. D. N. Y. 1926), 1926 A. M. C. 1008. It is in conflict with the decisions of the United States Circuit Court of Appeals for the Second Circuit in the cases of *New York and Cuba Mail Steamship Company* v. *United States* (16 F. (2d) 945), and *The Texas Company* v. *United States* (16 F. (2d) 948), applications for certiorari in which cases were filed by the Government and denied by this Court (Nos. 1064, 1065, and 1055, October Term, 1926). The refusal to grant certiorari at the request of the United States does not seem to have set the question at rest.

It is important that the question now be settled by this Court. Approximately one hundred and forty libels filed by authority of Private Acts, demanding damages of $5,000,000, are pending in the District Courts. They relate to collision losses with public vessels which occurred during the war period, 1917–1919. One hundred and forty-two additional libels, asking $3,650,000, have been filed in the Bering Sea cases where the losses occurred during the years 1886–1896.

It is our belief that the decision of the Circuit Court of Appeals for the First Circuit disallowing interest is sound. However, in view of the conflict of decisions between the two Circuit Courts of Appeal, we consider that the review of the question by this Court is desirable, and concur in the petition for writ of certiorari.

Respectfully submitted.

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OCTOBER, 1927.

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In the Supreme Court of the United States

OCTOBER TERM, 1928

No. 15

BOSTON SAND AND GRAVEL COMPANY, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS AND THE DISTRICT COURT

BRIEF FOR THE UNITED STATES ON REARGUMENT[1]

OPINIONS OF THE COURTS BELOW

The opinions of the Circuit Court of Appeals dealing with the questions of interest (R. 47) are reported in 29 F. (2d) 744.

The opinions of the District Court dealing with the interest questions (R. 39) are reported in 26 F. (2d) 963.

JURISDICTION

The decree of the Circuit Court of Appeals was entered June 4, 1927 (R. 60); rehearing denied

[1] Up to the time that this is printed no new brief for petitioner has been received, hence the references herein to "petitioner's old brief."

June 28, 1927 (R. 60). The petition for certiorari was filed September 21, 1927, and granted November 21, 1927. (R. 61.) The jurisdiction of this Court rests on Section 240 (a), Judicial Code, as amended by the Act of February 13, 1925.

THE QUESTION PRESENTED

The question presented is whether, in a proceeding against the United States in admiralty for collision losses, filed by authority of a private Act of Congress conferring jurisdiction upon the District Court to enter judgment for "legal damages * * * upon the same principle and measure of liability with costs as in like cases in admiralty between private parties," interest upon the several items of damages, from the dates of the losses, is recoverable.

THE STATUTE

An Act for the relief of the owner of the steam lighter *Cornelia*:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the claim of the owner of the steam lighter *Cornelia* arising out of a collision between said steam lighter and the United States destroyer *Hull* in Broad Sound, Boston Harbor, Massachusetts, on the 9th day of August, 1918, for and on account of the losses alleged to have been suffered in said collision by the owner of said steam lighter *Cornelia* by reason of damages to or the loss of said

steam lighter, her boats, engines, boilers, tackle, apparel, furniture, and supplies, may be submitted to the United States Court for the District of Massachusetts, under and in compliance with the rules of said court sitting as a court of admiralty; and that the said court shall have jurisdiction to hear and determine the whole controversy and to enter a judgment or decree for the amount of the legal damages sustained by reason of said collision, if any shall be found to be due either for or against the United States, upon the same principle and measure of liability with costs as in like cases in admiralty between private parties with the same rights of appeal: *Provided*, That such notice of the suit shall be given to the Attorney General of the United States as may be provided by order of the said court, and it shall be the duty of the Attorney General to cause the United States attorney in such district to appear and defend for the United States: *Provided further*, That said suit shall be brought and commenced within four months of the date of the passage of this Act. [c. 192, 42 Stat. pt. 2, 1520.]

STATEMENT OF THE CASE

This is a libel *in personam* in admiralty, filed in the District Court of the United States for the District of Massachusetts by the petitioner, as owner of the steam lighter *Cornelia*, against the United States, as owner of the destroyer *Bell*, to recover damages arising out of a collision between

the two vessels in the channel of Broad Sound at the entrance to Boston Harbor, August 9, 1918. (R. 8.) The authority for the proceeding is a private Act of Congress approved May 15, 1922, c. 192, 42 Stat. 1590.

The *Cornelia* was beached on the side of the channel and sank in the shallow water. (R. 8 et seq.) The *Bell* sustained minor damage in the collision (R. 5) but no cross libel therefor was filed.

The District Court found the *Cornelia* solely at fault (298 Fed. 768) and dismissed the libel; but, upon appeal, it was held that both vessels were at fault and that the damages should be divided. (R. 6.) On further proceedings, pursuant to the mandate, the District Court entered judgment for the petitioner in the sum of $45,542.34, one-half the damages, without interest. (R. 38.) The case again went to the Circuit Court of Appeals, which approved the holding of the District Court that interest should not be allowed.

SUMMARY OF THE ARGUMENT

(1) It has always been the policy and practice of the Government to deny interest on claims arising out of collisions with public vessels, as indicated by a chronological outline herein, showing development of this policy from the beginning, although in four known instances, upon consideration of the merits, Congress has authorized the recovery of "damages, *including interest* * * *."

(II) In 1901, after thirty years' handling of these cases by the Court of Claims, Congress initiated the practice of referring them to the District Courts, and, in connection with the very first statute, expressly declined to allow interest and made it quite clear that it did not understand or intend the phrase, "damages * * * upon the same principle and measure of liability as in like cases in admiralty between private parties," to include interest.

Since that time more than a hundred statutes have been enacted in the same language, and Congress has repeatedly manifested its understanding that the words used did not contemplate allowance of interest.

The District Courts have interpreted these statutes in many cases (fifty-two cited in the brief) as excluding interest, and their decrees, certified to Congress from time to time, have been paid as entered, without interest being added and without suggestion by Congress (either when appropriating money to pay the decree or, later, when enacting other statutes in the same language) that its oft-repeated phrase, "damages * * * upon the same principle and measure of liability as in like cases in admiralty between private parties," had been misconstrued. And the interpretation thus adopted by the courts, and approved and acquiesced in by Congress, became a part of the law.

The correctness of the conclusion reached in the District Courts was never seriously questioned prior to the decision of the Circuit Court of Appeals, Second Circuit, in *New York & Cuba Mail S. S. Co.* v. *United States*, 16 F. (2d) 945, on January 10, 1927—*after* enactment of the present statute.

(III) If we ignore the construction placed upon these statutes as a whole and test the isolated words and phrases thereof by general principles, as petitioner has done, even then they do not contain language sufficient to include interest. There is a distinction, well known in admiralty, between "damages" and "interest," allowance of which (between private parties) is a matter of discretion and dependent upon the circumstances of each case. Thus, it may be denied because of delay in bringing the action—but the rules governing its allowance or disallowance are based upon the theory of legal liability existing from the time of the accident, and seem impossible of application in cases against the Government.

Interest is usually awarded in admiralty between private parties, but it is awarded as interest and by that name, as indicated by excerpts herein from decrees of admiralty courts.

ARGUMENT

I

It Has Always Been the Policy and Practice of the Government, Declared by Congress, Recognized and Applied by the Executive Departments and the Courts, not to Allow Interest in Collision Cases

(a) THE GENERAL PRINCIPLE

That interest may not be awarded against the United States unless Congress shall expressly authorize it is, of course, elementary. That such authority is not usually given is common knowledge. *Angarica* v. *Bayard*, 127 U. S. 251, 260, states the general rule:

> It has been established, as a general rule, in the practice of the government, that interest is not allowed on claims against it, whether such claims originate in contract or in tort, and whether they arise in the ordinary business of administration or under private acts of relief, passed by Congress on special application.

And see *United States* v. *North American Co.*, 253 U. S. 330, 336; *Seaboard Air Line Ry. Co.* v. *United States*, 261 U. S. 299, 304.

(b) CHRONOLOGICAL OUTLINE OF DEVELOPMENT OF THIS POLICY IN COLLISION CASES

From the beginning of the Government until the year 1846 we find no instance of congressional recognition of a claim arising out of a collision with

a public vessel. Perhaps this may be accounted for by the view long prevailing in our early history, and thus stated by the Solicitor for the United States in *Dennis* v. *United States*, 2 Ct. Cls. 210:

> It is undoubtedly true that the claimant could not have proceeded against the vessel, but he might have proceeded against the master. Here it is alleged that the collision resulted from the failure of the government ship to have the required signals. The failure to do this must be regarded as negligence on the part of the master. For such negligence the master, and not the United States, is responsible, and for this the claimant, by the statutes to which reference has been made, has a complete remedy in the district courts.

(The court held that it had no jurisdiction, though the claimant attempted to waive the tort and sue in contract.)

Private Acts

1846–1871. During this period several private Acts appropriated specific sums, without referring the matter to any court, for damages sustained by private vessels in collision with those of the United States. See Act of August 8, 1846, c. 151, 9 Stat. 670 (the first instance found of such recognition by Congress of responsibility), appropriating $800 "for expenses incurred * * * for repairs;" Act of February 18, 1859, c. 37, 11 Stat. 560, appropriating $2,000 "in full compensation for the damages sus-

tained;" Act of December 15, 1862, c. 2, 12 Stat. 913, appropriating $9,500 "as full compensation * * * for damages received"—all without interest.

(The practice thus initiated has never been entirely abandoned. As late as March 3, 1927, c. 447, 44 Stat. 1833, Congress appropriated a specific sum of money as "the total cost of repairing the damages" resulting from a collision with a public vessel—and this sum did not include interest. House Rept. 1804, 69th Cong. 2d Sess.)

1871–1900. By joint resolution of March 3, 1871, 16 Stat. 705, the Court of Claims was authorized to take jurisdiction of a claim arising out of a collision between the schooner *William Carlton* and the U. S. Ram *Stonewall*, and for forty years thereafter Congress continued to refer such cases to the Court of Claims. Acts of June 22, 1874, c. 418, 18 Stat. 201; January 12, 1877, c. 20, 19 Stat. 503; March 3, 1879, c. 197, 20 Stat. 483; August 3, 1894, c. 191, 28 Stat. 219; January 9, 1897, c. 8, 29 Stat. 483; May 26, 1900, c. 593, 31 Stat. 1572; February 26, 1907, c. 1666, 34 Stat. pt. 2, 2567, etc. etc. The Court of Claims was expressly forbidden by statute to allow interest on any claim prior to entry of judgment (R. S. Sec. 1091; U. S. C. Title 28, Sec. 284); and, in fact, did not award any interest, either before or after judgment. *Carlton* v. *United States*, 10 Ct. Cls. 485; *Prescott* v. *United States*, 19 Ct. Cls. 684; *St. Louis, etc., Co.* v. *United States*, 33 Ct. Cls. 251.

1901–1928. For several years Congress continued to refer some collision cases to the Court of Claims. Principally, however, they have been referred to the District Courts. *Over a hundred private Acts,* beginning with that of March 2, 1901, c. 824, 31 Stat. 1789, have provided for the recovery in such courts of "*damages * * * upon the same principle and measure of liability as in like cases in admiralty between private parties*"—a few (mostly earlier ones) did not employ this formula. *Final decrees in more than fifty cases, entered without interest,* have been certified to Congress and paid.

In *New York & Cuba Mail S. S. Co.* v. *United States* (January 10, 1927), 16 F. (2d) 945, and a few cases in the same circuit following it, interest has been awarded—but no decree thus awarding interest from date of the collision has yet reached Congress for payment.

General Statutes

The Act of June 24, 1910, c. 378, 36 Stat. 605, 607 (amended by the Act of December 28, 1922, c. 16, 42 Stat. 1066; U. S. C. Title 34, Sec. 599), *authorized the Secretary of the Navy to "adjust and determine the amounts due" on small claims* arising out of collisions with public vessels, and later statutes (see Appendix) have conferred similar authority upon the heads of other Departments. Letters addressed to the Attorney General by the heads of those departments (see references in Appendix) show that

their usual practice of disallowing interest, recognized by this Court in *Angarica* v. *Bayard, supra,* has not been departed from when adjusting such claims. The awards in all cases are reported to Congress, as required by law. Act of July 7, 1884, c. 334, 23 Stat. 236, 254 (U. S. C. Title 5, Sec. 266); and provisos in the above-mentioned statutes.

The Act of March 3, 1925, c. 428, 43 Stat. 1112 (U. S. C. Title 46, Secs. 781, 782), *authorized libels in personam for damages caused by public vessels after April 6, 1920.* The Senate Committee on Claims, when reporting the bill (Sen. Rep. 941, p. 1, 68th Cong. 2d Sess.), thus stated its purpose:

> The bill, in principle, is simply a substitute for the practice, long established, of passing special bills, under which private owners have been allowed to submit to our admiralty courts admiralty claims of this character.

The Attorney General, writing the Chairman of the Committee, on April 8, 1924 (Sen. Rep. 941, p. 12, 68th Cong. 2d Sess.), made the following observations:

> Section 2 of the proposed bill provides that actions brought by authority of the bill shall be subject to and proceed according to the Suits in Admiralty Act. The Act allows interest in the discretion of the court from the time the cause of action arises. As applied by the proposed bill, interest would run in collision, salvage, and con-

> tract cases from the time the cause of action arose. Relief now granted against the Government in contract matters in the Court of Claims and district courts under the Tucker Act deny interest and allow it only upon the judgment or decree entered. *In the special Acts heretofore passed granting relief in collision matters the right to recover interest has generally been denied.* Allowance of interest from the time the cause of action arises in contract matters appears to have more merit than the allowance of interest in tort matters. The policy of the Government should be to allow interest in both classes of actions or to deny interest in both classes of cases. However, as I have stated, this is a legislative matter rather than a question for me to review. [Italics supplied.]

The bill was amended so as to provide, in language long contained in the Court of Claims Act, *supra*, that—

> No interest shall be allowed on any claim up to the time of the rendition of judgment unless upon a contract expressly stipulating for the payment of interest.

The Suits in Admiralty Act, March 9, 1920, c. 95, 41 Stat. 525, 526 (U. S. C. Title 46, Secs. 742, 743), to which the Attorney General referred, forbids the arrest of merchant vessels of the Emergency Fleet Corporation; but authorizes libels *in personam*, in respect of claims against such vessels, to proceed "according to the principles of law and to the rules

of practice obtaining in like cases between private parties," *with interest* on the damages, limited, however, to four per centum and to "run as ordered by the court."

(c) PETITIONER CONCEDES THE RULE BUT RELIES UPON A SO-CALLED EXCEPTION—HERE ANALYZED

Petitioner contends that this case comes not within the general rule stated in *Augarica* v. *Bayard, supra*, and so consistently followed in collision cases, but within the so-called exception—

> where interest is given expressly by an Act of Congress, either by the name of interest or by that of damages—

and refers to an opinion of Attorney General Cushing, September 20, 1855, 7 Op. A. G. 523, 524–526, 531, for an elaboration thereof.

Mr. Cushing declared (p. 526):

> To the general rule thus laid down, there may possibly be, as Mr. Legare suggests, "some rare and singular exceptions." I confess myself at a loss, however, to say what they are, or, at any rate, to derive a rule from such exceptions.

However, as an "apparent, but not real, exception, if the case exists," he suggests that a statute may authorize recovery of "damages" where "a statute-interest on the detention of money is the established rendering of the term," and illustrates the proposition by a reference to 1 Stat. 85,—the Judiciary Act of September 24, 1789, c. 20, 1 Stat. 73, 85, Section 23 of which provided that a writ of error

should be a *supersedeas* and that, upon affirmance, the court should "adjudge or decree to the respondent in error just damages for his delay, and single or double costs at their discretion."

But that would be quite a different case.

(d) CONGRESS HAS IN REMOTE INSTANCES AUTHORIZED ALLOWANCE OF INTEREST IN COLLISION CASES, BUT WHEN SO DOING HAS EVIDENCED ITS INTENTION IN UNMISTAKABLE LANGUAGE

The Act of March 3, 1927, c. 408, 44 Stat. 1809, authorized the recovery of "damages, *including interest*, * * * upon the same principles and measures of liability as in like cases in admiralty between private parties." A delay of more than ten years was attributable to the Government itself and Congress accepted the responsibility. Sen. Rep. 1658, 69th Cong., 2d Sess.

Three other statutes have provided for interest in the same manner. Acts June 3, 1924, c. 285, 43 Stat. 1369; June 7, 1924, c. 380, *id.* 1374; March 3, 1925, c. 504, *id.* 1389.

II

THE LANGUAGE USED IN THIS AND MANY SIMILAR ACTS HAS RECEIVED A SETTLED CONSTRUCTION BY THE COURTS, BY THE EXECUTIVE DEPARTMENTS AND BY CONGRESS, AS EXCLUDING INTEREST

(a) ORIGIN OF THE LANGUAGE AND ITS INTERPRETATION BY FIRST CONGRESS TO EMPLOY IT. SUBSEQUENT USE IN MANY PRIVATE ACTS

On March 14, 1900, after thirty years' handling of these collision cases by the Court of Claims, the

Senate Committee on Claims reported to the Senate, in connection with the claim of the Brooklyn Ferry Company for damages arising out of a collision between the Ferry Boat New York and the United States Steamer *Dolphin* (Sen. Rep. 681, 56th Cong., 1st Sess.):

> It is contended that these matters are the proper subjects of investigation by a court of the United States sitting in admiralty, and as the principal office of the ferry company is in the eastern district of New York, and the collision happened therein, that the United States district court for that district is the proper forum for the investigation of the questions involved, and that therefore jurisdiction should be conferred upon such court, with authority to render such judgment as will secure the payment by the United States of the damages, if any, that may be found to be due to the ferry company, with costs and interest. (Italics supplied.)

The bill accompanying the report provided:

> That a claim against the United States of the Brooklyn Ferry Company, of New York, * * * owner of the ferryboat New York, for damages caused by collision between the said ferryboat and the United States Steamer *Dolphin*, * * * may be sued for by the said ferry company, in the United States district court for the eastern district of New York, sitting as a court of admiralty and acting under the rules governing such court, and said court shall have jurisdiction

> to hear and determine such a suit and to enter a judgment or decree for the amount of such *damages*, if any shall be found to be due, against the United States in favor of the said ferry company, *upon the same principles and measure of liability, with costs and interest as in like cases in admiralty between private parties*, and with the same rights of appeal. [Italics supplied.]

The House Committee on Claims, reporting a similar bill on March 20, 1900, recommended elimination of the provisions for interest. House Rep. 721, 56th Cong. 1st Sess.

The Senate bill, meanwhile having been amended by striking out the words, "with costs and interest," was later substituted for the House bill (House Rept. 1629, 56th Cong. 1st Sess.), and, thus amended, became law. Act March 2, 1901, c. 824, 31 Stat. 1789; and see discussion in *Watts* v. *United States*, 129 Fed. 222, 226.

More than one hundred private Acts, since that time, have authorized the recovery of "damages * * * upon the same principle [or principles] and measure [or measures] of liability as in like cases in admiralty between private parties"—the language of the first Act, the language of the present one. (Petitioner has counted ninety-six, during fifteen years, "comparable in phraseology to that here in question"—old brief pp. 16-17.) More than two hundred cases under such statutes are now pending in the courts.

As heretofore pointed out, Congress has in four instances added the words, "including interest."

Several statutes, enacted after the decision in *New York & Cuba Mail S. S. Co.* v. *United States*, 16 F. (2d) 945, allowing interest, have expressly provided that "no interest shall be allowed"—an amendment hastily added to all such bills then pending before Congress. February 24, 1927, c. 191, 44 Stat. 1789, etc.; Cong. Rec., v. 68, pt. 4, pp. 3988, 3995, February 16, 1927; House Repts. 1993, 1994, 1997, 1999, 2001, 2003; Sen. Repts. 1682, 1683—all 69th Cong., 2d Sess.

(3) FOR TWENTY FIVE YEARS THE DISTRICT COURTS UNIFORMLY INTERPRETED THESE STATUTES AS EXCLUDING INTEREST, AND CONGRESS APPROPRIATED MONEY TO PAY EACH DECREE AS ENTERED, WITHOUT ADDING INTEREST AND WITHOUT SUGGESTION OF DISAPPROVAL.

The Secretary of the Treasury, on February 11, 1927, wrote the Attorney General as follows:

> In compliance with your request, there has been prepared by this Department, and is enclosed herein, a statement exhibiting the judgments rendered by United States District Courts under Special (Private) Acts of Congress which have been certified to Congress, appropriations provided and payments effected during the twenty-year period covering the calendar years 1906 to 1926, inclusive.
>
> It will be noted that the only case where interest was appropriated and paid was in connection with the judgment rendered in the United States District Court for the North-

ern District of California in favor of the King Coal Company, as shown on page 2 of the statement. [In this case interest *from date of the decree* was paid, apparently through inadvertence, as pointed out below.]

The statement has since been brought up to date, and we have added three early cases. All of them appear below, arranged according to judicial districts—a total of forty-eight (48) collision cases, under special Acts, in which decrees have been entered without interest, certified to Congress, appropriations made without interest being added, and payments finally effected, without, so far as our research has disclosed, a single suggestion from Congress (either when appropriating money to pay the decree entered or, later, when enacting other statutes in the same words) that its language had been misconstrued.

(No case is here included except where a final decree has been entered and *paid* without interest, although four (4) others in which District Courts denied interest are mentioned elsewhere in the brief.)

Forty-three (43) were adjudicated under statutes providing for "damages * * * upon the same principle [or principles] and measure [or measures] of liability as in like cases in admiralty between private parties," two (2) under statutes which vary the phrase but slightly, and three (3) under statutes not employing the usual formula but calling for application of the same principles.

In connection with each there is given: (1) the year of the decree; (2) the citation, if reported; (3) reference to the congressional document showing certification of the decree to Congress for payment (except in three early cases, where no such document has been found); and (4) citation to the jurisdictional statute.

Eastern District of New York

Brooklyn Ferry Co. v. *United States* (1903), 122 Fed. 696 (Act Mar. 2, 1901, c. 824, 31 Stat. 1789); *Merritt & Chapman, etc., Co.* v. *United States* (1921), H. Doc. 358, 67th Cong., 2d Sess. (Act May 6, 1920, c. 169, 41 Stat. 1469); *John E. Moore Co.* v. *United States* (1923), H. Doc. 145, 68th Cong., 1st Sess. (Act March 3, 1921, c. 144, 41 Stat. 1553); *Merritt & Chapman, etc., Co.* v. *United States* (1923), H. Doc. 145, 68th Cong., 1st Sess. (Act April 28, 1922, c. 163, 42 Stat. 1587); *Erie R. R. Co.* v. *United States* (1925), H. Doc. 169, 69th Cong., 1st Sess. (Act June 3, 1924, c. 247, 43 Stat. 1370); *Pendleton Bros. et al.* v. *United States* (1926), H. Doc. 332, 69th Cong., 1st Sess. (Act Mar. 3, 1923, c. 243, 42 Stat. 1792); *Nippon Yusen Kabushiki Kaisha* v. *United States* (1926), 1926 A. M. C. 1008, S. Doc. 142, 69th Cong., 1st Sess. (Act Feb. 16, 1925, c. 239, 43 Stat. 1564).

Southern District of New York

Watts v. *United States* (1904), 129 Fed. 222, 226 (Act May 27, 1902, c. 887, 32 Stat. 207, 242); *United States* v. *New England Steamship Co.*,

"The Commonwealth" (1924), 297 Fed. 651, H. Doc. 632, 68th Cong., 2d Sess. (Act Feb. 20, 1914, c. 25, 38 Stat. 1244); *Clyde S. S. Co.* v. *United States* (1924), H. Doc. 632, 68th Cong., 2d Sess. (Act Feb. 26, 1923, c. 133, 42 Stat. 1774); *Aktieselskabet Marie di Giorgio* v. *United States* (1925), H. Doc. 169, 69th Cong., 1st Sess. (Act Jan. 28, 1925, c. 107, 43 Stat. 1547); *Pan American, etc., Co.* v. *United States* (1926), H. Doc. 329, 69th Cong., 1st Sess. (Act Sept. 18, 1922, c. 333, 42 Stat. 1602); *Raritan Copper Works* v. *United States* (1926), H. Doc. 721, 69th Cong., 2d Sess. (Act Feb. 16, 1925, c. 237, 43 Stat. 1563); *Bruusgaard Kiosteruds Dampskibs Aktieselskab* v. *United States* (1927), H. Doc. 721, 69th Cong., 2d Sess. (Act June 7, 1924, c. 384, 43 Stat. 1376); *Eastman* v. *United States* (1927), H. Doc. 76, 70th Cong., 1st Sess. (Act May 7, 1926, c. 268, 44 Stat. 1469).

Eastern District of Virginia

Cobridge S. S. Co. v. *United States* (1912), H. Doc. 1373, 62 Cong., 3d Sess. (Act March 4, 1909, c. 334, 35 Stat. 1622); *Arundel Sand & Gravel Co.* v. *United States* (1921), S. Doc. 32, 67th Cong., 1st Sess. (Act Dec. 31, 1919, c. 36, 41 Stat. 1457); *Eastern Transpt. Co.* v. *United States* (1921), S. Doc. 31, 67th Cong., 1st Sess. (Act March 30, 1920, c. 114, 41 Stat. 1461); *Warren Transpt. Co.* v. *United States* (1921), H. Doc. 358, 67th Cong., 2d Sess. (Act June 5, 1920, c. 283, 41 Stat. 1521, 1639); *New England Coal & Coke Co. et al.* v. *United States*

(1922), S. Doc. 258, 67th Cong., 2d Sess. (Act April 26, 1916, c. 87, 39 Stat. 1261); ***Fortunato*** v. *United States* (1922), H. Doc. 527, 67th Cong., 4th Sess. (Act Feb. 18, 1922, c. 62, 42 Stat. 1578); *Th. Brovig* v. *United States* (1924), H. Doc. 302, 68th Cong., 1st Sess. (Act Feb. 26, 1923, c. 136, 42 Stat. 1776); *Lloyd Mediterraneo Societa Italiana di Navigazione* v. *United States* (1924), H. Doc. 534, 68th Cong., 2d Sess. (Act Feb. 26, 1923, c. 137, 42 Stat. 1777); *Fred E. Jones Dredging Co.* v. *United States* (1924), H. Doc. 534, 68th Cong., 2d Sess. (Act March 2, 1923, c. 206, 42 Stat. 1787); *Picton S. S. Co.* v. *United States* (1926), H. Doc. 329, 69th Cong., 1st Sess. (Act Feb. 7, 1925, c. 160, 43 Stat. 1555); *Beaufort County Lumber Co.* v. *United States* (1926), H. Doc. 329, 69th Cong., 1st Sess. (Act Feb. 16, 1925, c. 247, 43 Stat. 1568); *Ferlita* v. *United States* (1926), S. Doc. 142, 69th Cong., 1st Sess. (Act Feb. 28, 1925, c. 380, 43 Stat. 1581).

District of Massachusetts

Meyers v. *United States* (1918), S. Doc. 429, 65th Cong., 3d Sess. (Act Aug. 21, 1916, c. 391, 39 Stat. 1393); *Deering* v. *United States* (1922), 281 Fed. 281, H. Doc. 358, 67th Cong., 2d Sess. (Act June 5, 1920, c. 284, 41 Stat. 1521, 1639); *Thurlow* v. *United States* (1924), 295 Fed. 905, H. Doc. 534, 68th Cong., 2d Sess. (Act May 15, 1922, c. 191, 42 Stat. 1589); *Nantasket Beach S. B. Co.* v. *United States* (1924), 297 Fed. 656, H. Doc. 534, 68th Cong. 2d Sess. (Act May 15, 1922, c. 192, 42 Stat. 1590);

Staples Transpt. Co. v. *United States* (1925), H. Doc. 169, 69th Cong. 1st Sess. (Act Feb. 16, 1925, c. 244, 43 Stat. 1567).

Northern District of California

King Coal Co. v. *United States* (1924), H. Doc. 169, 69th Cong., 1st Sess. (Act April 16, 1920, c. 148, 41 Stat. 1467); *Alaska Commercial Co.* v. *United States* (1925), 1925 A. M. C. 1269, H. Doc. 329, 69th Cong., 1st Sess. (Act April 12, 1924, c. 100, 43 Stat. 1361); *Charles Nelson Co.* v. *United States* (1926), S. Doc. 142, 69th Cong., 1st Sess. (Act Feb. 16, 1925, c. 251, 43 Stat. 1571); *Rolph Navigation, etc., Co.* v. *United States* (1927), H. Doc. 721, 69th Cong., 2d Sess. (Act Nov. 17, 1921, c. 126, 42 Stat. 1568).

Eastern District of Louisiana

Tropical Fruit S. S. Co. v. *United States* (1918), H. Doc. 1701, 65th Cong., 3d Sess. (Act Feb. 14, 1917, c. 65, 39 Stat. 1474); *Peters* v. *United States* (1927), H. Doc. 76, 70th Cong., 1st Sess. (Act Feb. 21, 1923, c. 104, 42 Stat. 1771); *Kokusai Kisen Kabushiki Kaisha* v. *United States* (1927), H. Doc. 76, 70th Cong., 1st Sess. (Act Feb. 25, 1925, c. 332, 43 Stat. 1576).

District of Maryland

Eastern Transpt. Co. v. *United States* (1917), 253 Fed. 42, H. Doc. 1179, 65th Cong., 2d sess. (Act Aug. 9, 1916, c. 312, 39 Stat. 1353); *Baltimore Dry-*

docks, etc., Co. v. *United States* (1921), S. Doc. 62, 67th Cong., 1st Sess. (Act Dec. 26, 1920, c. 5, 41 Stat. 1523).

Southern District of Florida

Emile et al. v. *United States* (1926), H. Doc. 621, 69th Cong., 2d Sess. (Act Aug. 24, 1921, c. 98, 42 Stat. 1567).

Eastern District of Pennsylvania

Lehigh Coal, etc., Co. v. *United States* (1928), H. Doc. 281, 70th Cong., 1st Sess. (Act Feb. 14, 1927, c. 151, 44 Stat. 1773).

District of Maine

Pennell v. *United States* (1908), 162 Fed. 75, 76 *et seq.* (Act Feb. 24, 1905, c. 777, 33 Stat. 743, 810).

District of New Jersey

Alexanderson v. *United States* (1922), S. Doc. 258, 67th Cong., 2d Sess. (Act March 3, 1921, c. 145, 41 Stat. 1353).

District of Rhode Island

Miller v. *United States* (1924), 289 Fed. 816, H. Doc. 534, 68th Cong., 2d Sess. (Act February 18, 1922, c. 61, 42 Stat. 1578).

Eastern District of South Carolina

Dampskibesselskabet Dannebrog v. *United States* (1925), H. Doc. 169, 69th Cong., 1st Sess. (Act Aug. 9, 1921, c. 59, 42 Stat. 1565).

Eastern District of Michigan

Great Lakes Engineering Works (Russell, Receiver) v. *United States* (1926), H. Doc. 329, 69th Cong., 1st Sess. (Act Jan. 28, 1925, c. 105, 43 Stat. 1547).

In eight instances, through inadvertence or otherwise, the decree originally contained the words "with interest." *Tropical Fruit S. S. Co.* v. *United States; New England Coal & Coke Co. et al.* v. *United States; Merritt & Chapman, etc., Co.* v. *United States* (1921); *Merritt & Chapman, etc., Co.* v. *United States* (1923); *John E. Moore Co.* v. *United States; Alaska Commercial Co.* v. *United States; Charles Nelson Co.* v. *United States; King Coal Co.* v. *United States.* In each case, however, the matter was rectified, usually with consent of counsel for the libellant. The following communication, addressed to Government counsel by Judge Kerrigan, May 18, 1925, indicates how the decree in *Alaska Commercial Co.* v. *United States* happened at first to contain the words "with interest":

> In preparing my memorandum opinion in the case of *Alaska Commercial Co.* v. *United States of America*, I inadvertently overlooked the fact that interest was under the terms of the statute in question not allowed. Hence, I have stricken from the face of the opinion as filed the word "interest."

A certified copy of the final decree shows that interest was not allowed.

In *King Coal Co.* v. *United States* a similar correction was made. The matter then went to the Circuit Court of Appeals on other issues, and judgment against the United States was affirmed. The opinion of the appellate court did not mention interest; the final decree, however, awarded interest *from the date thereof*, without objection being raised, and in this shape was certified to Congress and paid. The matter can be accounted for now only on the ground of inadvertence.

In *United States* v. *New England S. S. Co.* ("*The Commonwealth*"), interest was at first awarded, but a consent decree finally entered did not allow it.

We know of no instance since the beginning of the Government in which interest prior to date of the decree has been *paid* by the United States in a collision case, save the three following, where Congress, upon consideration of the merits, expressly authorized a recovery of "damages *including interest*, * * * upon the same principle and measure of liability as in like cases in admiralty between private parties." *Colonial Navigation Co.* v. *United States* (E. D. N. Y., 1927), H. Doc. 281, 70th Cong., 1st Sess. (Act June 3, 1924, c. 245, 43 Stat. 1369); *Donaldson* v. *United States* (E. D. Pa., 1927), H. Doc. 281, 70th Cong., 1st Sess. (Act March 3, 1927, c. 468, 44 Stat. 1839); *Mallory S. S. Co.* v. *United States* (E. D. N. Y., 1927), H. Doc. 76, 70th Cong., 1st Sess. (Act March 3, 1925, c. 504, 43 Stat. 1589).

There is no room for doubt that Congress knew how its oft-repeated phrase, "damages * * *

upon the same principle and measure of liability as in like cases in admiralty between private parties," was being interpreted. In connection with each decree certified it was distinctly pointed out that interest was not included—

> "nor is the payment of interest provided for in the jurisdictional Act."

The quoted words, taken from the President's letter of August 12, 1921, transmitting the decree in *Baltimore Dry Docks, etc., Co.* v. *United States* (S. Doc. 62, 67th Cong., 1st Sess.), commonly appear.

Very few of the cases discuss the question of allowance of interest; in very few, indeed, has it been an issue. Congress seemed to have made it very clear when enacting the first of these statutes that it did not understand, or intend, "damages * * * upon the same principle and measure of liability as in like cases in admiralty between private parties" to include interest; the courts early found and gave effect to the intent so manifested; and the result accorded with the practice prevailing when collision cases were adjusted by Committees of Congress, by the Executive Departments, or in the Court of Claims. There seemed hardly room for controversy. Authors and compilers accepted the principle without question. Benedict on Admiralty (5th ed.), Sec. 419; Sutherland on Damages (4th ed.), Sec. 1294 (vol. 5, p. 5013); 1 Corpus Juris, 1363, etc.

Written opinions, denying interest, do discuss the principles in the following cases: *Watts* v. *United States* (S. D. N. Y., 1904), 129 Fed. 222, 226; *Pennell* v. *United States* (D. C. Maine, 1908), 162 Fed. 75, 76, et seq.; *Nantasket Beach Steamboat Co.* v. *United States* (D. C. Mass., 1924), 297 Fed. 656; *Whitelaw* v. *United States* (N. D. Calif., 1925), 9 F. (2d) 103, 104; *Nippon Yusen Kabushiki Kaisha* v. *United States* (E. D. N. Y., 1926), 1926 A. M. C. 1008 (see appendix); *Long Island R. R. Co.* v. *United States* (E. D. N. Y., 1926), 1926 A. M. C. 1011 (excerpt *infra* p. 33; *Commonwealth & Dominion Line Ltd.* v. *United States* (E. D. N. Y., 1926—short opinion, denying interest, not reported), reversed in part in 20 F. (2d) 729, now pending in this Court on writ of certiorari; *Alaska Commercial Co.* v. *United States* (N. D. Calif., 1925—explanation of Judge Kerrigan, *supra*); and also, of course, the opinions below in this case.

Whitelaw v. *United States* (not a collision case) is one of a hundred and nineteen (119) cases denying interest under the Act conferring jurisdiction to award damages for wrongful seizure, etc., of Behring Sea fishing vessels. It is cited here because, when denying, in that one case alone, thirty-five years' interest claimed on nearly a hundred thousand dollars, the court discussed the principles involved and the long practice of admiralty courts in collision cases brought under special Acts.

Watts v. *United States* (although preceded by *Brooklyn Ferry Co.* v. *United States*) was the first

special Act case to discuss the question of interest in a published opinion. Considering the prior practice and the apparent intention of Congress not to depart therefrom when referring these matters to the District Courts, instead of to the Court of Claims (as evidenced by the legislative history of the Acts) the court reached the following conclusion (129 Fed. p. 227):

> The claimants here, while conceding that if the matter had been referred by Congress to the Court of Claims, [as had been the practice for many years], interest would not be recoverable, urge that as it has been sent to an admiralty court, which ordinarily allows interest as part of the damages, interest should be granted. The question turns upon the intention of Congress. It would seem that under the authorities cited, interest is not allowable, unless expressly provided for, and there being a complete absence of any allusion to interest in the Act, under which the action has been tried here, it should not be granted.

The late, and seemingly well-considered (although unreported), opinion in *Nippon Yusen Kabushiki Kaisha* v. *United States* declared:

> I am not convinced that by the use of the words "upon the same principles and measures of liability," Congress showed its intention to overrule its general policy on the subject of not allowing interest unless specifically provided * * *

A distinction between damages and interest exists (*The Scotland*, 118 U. S. 507), in which case, at page 518, Mr. Justice Bradley, writing for the Court, says: "The allowance of interest on damages is not an absolute right."

Therefore, by the use of the words, "principles and measures of liability," Congress did not show any intent to increase the power which it had conferred on this Court "to enter a judgment or decree for the amount of such damage and costs," so as to allow interest on such damages, and however strongly may it appeal to this Court that the case at bar is one in which interest might, under ordinary conditions, properly be allowed, it does not seem to me that Congress, by the Tucking Act, supra, conferred upon this Court power to make an award of interest from the date of the collision to the date of the entry of the decree herein.

We seek, of course, the intention of Congress. Consider, then, that for nearly twenty-five years, the District Courts interpreted these private Acts as excluding interest (according thereby with the policy of the Government from the beginning and with the practice of the Court of Claims, Committees of Congress and the Executive Departments when adjusting collision claims), that their decrees so entered were certified to Congress, which appropriated the money called for, without adding interest and without suggestion that its language had been misconstrued, and then continued throughout

that period to use the same language in a hundred statutes. How can this be reconciled on any other hypothesis than that Congress intended to deny interest, as it always had done, and approved and adopted the construction placed upon its language by the courts? *Case of the Sewing Machine Companies*, 18 Wall. 553, 594; *United States v. Morrison*, 262 U. S. 328, 332, and cases there cited.

>>> THE SUBSTITUTION OF CONGRESS FOR COURTS IS A CLEAR INDICATION THAT THESE WORDS WERE MEANT NOT AS CONDEMNATION BUT AS DESCRIBING THE POWER OF CONGRESS

It will be recalled that the bill in the *Brooklyn Bridge* case (the first) provided for—

> damages * * * upon the same principles and measure of liability with rules and interest, as in like cases in admiralty between private parties—

but that Congress, declining to depart from the time-honored practice theretofore prevailing, refused to authorize allowance of interest and by amendment struck out the words underscored. From this it is apparent that the author of the phrase, "damages * * * upon the same principle and measure of liability as in like cases in admiralty between private parties," had no idea that, standing alone, it included interest; nor did Congress. *Miller v. United States*, House Rep. 725, 38th Cong., 1st Sess., both supra.

[illegible] such instances of unsuccessful effort to add, "including interest," are collected on the following pages.

Sen. Rep. 636; Cong. Rec., vol. 53, pt. 10, p. 9532, 64th Cong., 1st Sess. (Act August 9, 1916, c. 312, 39 Stat. 1353). The bill read "damages, interest, and costs." The Secretary of the Navy reported—

> It has been the general practice of the Congress in bills of this character not to allow interest against the United States. It is accordingly suggested that the word "interest" * * * be stricken out.

This was done by amendment.

House Rep. 620; Cong. Rec., vol. 53, pt. 10, p. 9418, 64th Cong., 1st sess. (Act August 21, 1916, c. 391, 39 Stat. 1261). Attorney for the claimant urgently insisted, because of the circumstances "that if ever there was a case in which interest should be allowed this is such a case," and that recovery should be authorized—

> not only for the damage, but for the interest on the damage.

The Secretary of the Navy recommended passage of the bill, worded "including interest." On recommendation of the Committee, however, Congress eliminated those words by amendment.

Cong. Rec., vol. 66, pt. 4, pgs. 3459, 3537, 68th Cong., 2d Sess. (Act February 16, 1925, c. 239, 43 Stat. 956). The bill, worded "including interest," passed the Senate. The House eliminated those words by amendment and the Senate concurred. Note the following explanation in the Senate of the House amendment:

> *Mr. Underwood.* Mr. President, there are three bills from the House of the same nature on the desk, with the same amendment, which reduces the amount the claimant is to receive. I ask that they may receive immediate consideration. • • • As the bills passed the Senate they allowed interest. The House strikes out the allowance of interest and reduces the amount.

Cong. Rec., vol. 67, pt. 4, pp. 4058–4060, 69th Cong., 1st Sess. (Acts May 1, 1926, c. 213, 44 Stat. 1464 and May 7, 1926, c. 270, 44 Stat. 1470). These two bills and several others not here listed, had contained the words, "including interest," just eliminated by amendment; whereupon the following colloquy took place.

> *Mr. King.* Do I understand that the interest provision has been striken out of the bills which have just been passed, so that the judgments shall not bear interest?
>
> *Mr. Copeland* [who had reported the measures]. Yes. The words "including interest" were stricken out of the bills.

And in several other instances effort has been made, while the bill was pending before Congress, to have allowance of interest authorized. Thus, the Acts of May 6, 1920, c. 169, 41 Stat. 1469; May 19, 1924, c. 159, 43 Stat. 1364; Feb. 16, 1925, c. 237, 43 Stat. 1263; Feb. 16, 1925, c. 238, 43 Stat. 1264; Feb. 16, 1925, c. 251, 43 Stat. 1271, as originally introduced, contained the words, "including interest." In one instance the bill so worded passed the Senate,

but the House insisted upon their elimination. In each instance the bill, before passage, was amended so as to eliminate the words, "including interest." Cong. Rec., vol. 65, pt. 5, p. 4686, 68th Cong., 1st Sess.; vol. 66, pt. 4, pp. 3458, 3463, 3491, 68th Cong., 2d Sess.

On the other hand, in four instances, as heretofore pointed out, effort to add the words, "including interest," was successful. In one instance the Senate passed a bill containing them; the House, feeling that interest should not be allowed, eliminated them by amendment; but the Senate declined to concur in the amendment and, finally, the House yielded. Cong. Rec., vol. 66, pt. 5, p. 4834, 68th Cong., 2d Sess. (Act March 3, 1925, c. 504, 43 Stat. 1589). In such cases the statute provided for—

> damages, *including interest*, * * * upon the same principle and measure of liability as in like cases in admiralty between private parties.

Was insertion of the words, "including interest," mere tautology? Have these deliberations been utterly meaningless? The courts have not thought so. Note the following paragraph from Judge Campbell's opinion in *Long Island R. R. Co. v. United States* (E. D. N. Y., 1926—not reported, but summarized in 1926 A. M. C., p. 1011):

> A further reason for denying interest may be found, if a further reason be necessary, because it appears that the bill in the suit at bar, as reported to Congress, included

a provision for interest, and that the bill was amended in the House of Representatives by striking out the words "including interest" after the word "damages."

(d) THE RECENT CASES IN THE SECOND CIRCUIT ALLOWING INTEREST ARE NOT WELL CONSIDERED, AND REPRESENT CONSPICUOUS DEPARTURES FROM THE ACCEPTED VIEW

Of the cases referred to by petitioner (old brief, pp. 20-22), as allowing interest, *The Friedrich der Grosse*, 1926 A. M. C. 361, and *Texas Co.* v. *United States*, 11 F. (2d) 981, affirmed in 16 F. (2d) 948, are the same case reported under different names. The opinion in *Alaska Commercial Co.* v. *United States*, 1925 A. M. C. 1269, did originally contain the words, "with interest and costs," but as hereinbefore pointed out (p. 24) this was an error promptly corrected by the judge himself.

This leaves for us to consider, only *The Commonwealth*, 297 Fed. 651; *New York & Cuba Mail S. S. Co.* v. *United States*, 16 F. (2d) 945; *Texas Co.* v. *United States;* and *Commonwealth & Dominion Line, Ltd.*, v. *United States*, 20 F. (2d) 729 (now pending in this Court on writ of certiorari)—all in the Second Circuit. The two last mentioned followed *New York & Cuba Mail S. S. Co.* v. *United States*, in the Circuit Court of Appeals, without further discussion.

Pursuant to statutory direction, the United States libeled the Steamship *Commonwealth* to recover damages resulting from a collision between that vessel and the battleship *New Hampshire*. By

authority of the same Act, the owner of the *Commonwealth* filed a cross libel. Both claimed interest. The court, devoting but a few meager sentences to the question of interest, announced its holding in the following language:

> The Private Act does not regulate merely the action by the New England Steamship Company; it expressly covers both actions; it provides for judgment or decree either for or against the United States upon the same principles and measure of liability as in like cases in admiralty between private parties.
>
> Concededly, if both were private parties, interest would be allowed; the United States asserts its right to interest, but it denies the counter right. In my judgment, if the United States is entitled to interest, then under the fair construction of the act, a similar right is given to the other party. That the United States is so entitled has not been and can not be denied.

Thus, while the proceeding was instituted under and in accordance with the direction of the statute, which did not provide for interest, the court assumed, without question, that the United States would be entitled thereto—giving no thought to the possible exclusiveness of the remedy so provided or the effect upon general principles otherwise applicable—and then made this assumption the basis of its holding that "if the United States is entitled to interest * * * a similar right is given to the other party."

An appeal was taken by the United States but was abandoned upon entry of a consent decree, without interest—certified to Congress (House Doc. 632, 68th Cong. 2d Sess.) with the following explanation:

> * * * The District Court allowed interest from January 17, 1913, although the special act under which the cross libel was filed made no mention of interest. Before the appeal was perfected the owners of the *Commonwealth* offered to concede to the Government the amount of interest, approximately $4,000, provided the appeal was withdrawn. In view of the concession to the Government of about $4,000, the department determined that the appeal be withdrawn.

The foregoing decision was by Judge Mack. In *New York & Cuba Mail S. S. Co.* v. *United States*, 300 Fed. 827, District Judge Winslow declined to follow it, and disallowed interest without comment. In *Texas Co.* v. *United States*, 11 F. (2d), 981, Judge Goddard allowed interest. He held that if the United States, under the private Act, may demand damages it is entitled to interest, and that if it had a right to claim interest, then, regardless of whether it did or not, the private libelant might do so.

And this, it will be remembered, is based upon a mere assumption of a district judge on a proposition which was not controverted before him. Whether or not the United States when proceeding under such an Act is entitled to interest would seem

in itself a question worthy of consideration. If it may demand interest, it does not necessarily follow that the private libelant may do so. *United States* v. *Verdier*, 164 U. S. 213, 218; *United States* v. *North American Co.*, 253 U. S. 330, 336.

The Circuit Court of Appeals, Second Circuit, reversing the decision of Judge Winslow and affirming that of Judge Goddard, awarded interest in both cases. It recognized the need of statutory authority, but thought this might be inferred from the intention (which it professed to find) that the principle of *restitutio in integrum* should apply.

It relied upon *The Nuestra Senora de Regla*, 108 U. S. 92; *The Paquete Habana*, 189 U. S. 453 (prize cases); *Seaboard Air Line Ry. Co.* v. *United States*, 261 U. S. 299 (a "just compensation" case); and *United States* v. *The Thekla*, 266 U. S. 328—which are discussed *infra* (pp. 46, 48), together with others of the same type cited by petitioner. In all, it will be observed, the facts and applicable principles differ materially from those here under consideration.

But the chief fault of the opinion in *New York & Cuba Mail S. S. Co.* v. *United States* is that it gave no consideration whatever to the long series of private Acts, similarly worded, the policy of Congress, and its long-continued acquiescence in and reliance upon the judicial construction placed upon the language used time after time, often under circumstances utterly inconsistent with the theory that allowance of interest was intended. In

fact, it is apparent, as suggested below, that the court was not fully and properly advised concerning them.

III

If We Ignore the Construction Placed Upon These Statutes as a Whole, and Test the Isolated Words and Phrases Thereof by General Principles, as Petitioner Has Done, Even Then They do not Contain Language Sufficient to Include Interest

(a) "Damages" and "interest" are distinct terms, well understood in admiralty; interest, when awarded (in the discretion of the court), is awarded as interest and by that name

In the first place, we must accept the principle that there is a distinction between damages and interest, allowance of which is a matter of discretion and dependent upon the circumstances of each case. *The Scotland*, 118 U. S. 507, 518, 519—

> The allowance of interest on damages is not an absolute right. Whether it ought or ought not to be allowed depends upon the circumstances of each case, and rests very much in the discretion of the tribunal which has to pass upon the subject, whether it be a court or a jury. * * * *In affirming a decree in admiralty in this court, if interest is not expressly allowed, it is not included.* [Italics supplied.]

And, to the same effect, see *The Maggie J. Smith*, 123 U. S. 349, 356; *The Albert Dumois*, 177 U. S. 240, 255; *Eastern S. S. Corp.* v. *Great Lakes Dredge*,

etc., Co., 256 Fed. 497, 505; 1 Corpus Juris 1362, and cases cited.

No authority cited by petitioner rejects this rule; some expressly declare it; and their cumulative effect is, not that "interest is to be awarded," but that it *may* be awarded (between private parties).

The Umbria, 166 U. S. 404, 421, did not consider whether or not interest *should* be allowed, but held that recovery was "limited to the value of the vessel, with interest thereon," etc.—that "probable profits of a charter party" should not be allowed—which was the real issue.

But petitioner concedes (old brief, p. 13) that—

> * * * discretion exists in reference to the disallowance of interest in all tort cases, whether maritime or non-maritime * * *.

As concerns maritime cases, this statement is amply supported by the following authorities (cited in petitioner's old brief, pp. 7–12).

Sutherland on Damages (4th ed.):

> SEC. 1290. * * * While the measure of damages for loss of a vessel is, in the first instance, the market value, in the absence of a market for such type of vessel the damages are to be ascertained by deducting the amount of depreciation from the original cost. * * *
>
> SEC. 1294. * * * Interest on the value of the vessel or cargo is recoverable from the date of the casualty, unless there is a recovery on some other basis than that of

> the value of the lost property. It is said, however, that the recovery of interest is a matter of discretion. * * *

Benedict on Admiralty (5th ed.), Sec. 419:

> The allowance of interest on damages in cases of collision, or other unliquidated damages, is always in the discretion of the court * * *

Roscoe on Damages in Marine Collisions (2d ed.), p. 105 (note):

> It should therefore be considered that [in the United States] interest will be allowed according to the discretion of the Court in relation to particular uses and that there is no definite rule on the subject.

The Reno, 134 Fed. 555, 556:

> The damages sustained by the owner of a vessel which is sunk in a collision, when the vessel is a total loss, is her value at the time of the loss, to which interest may be added to afford complete indemnity.

The Kate (1899), Prob. Div. 165, 175:

> If the vessel be under charter it appears to me that a case arises in which the profits under the charter party should take the place of interest, as more accurately representing the loss to the owner. * * * The proper measure of damage in this case is the value of the vessel at the end of her voyage, plus the profits lost under the charter party, and this is what the learned registrar has allowed.

The Rhode Island, 20 Fed. Cas. 636, 638:

> In adopting, in this instance, interest or a percentage on the value of the boat for the time she was kept out of the libellant's use by means of the collision, I do not assume to lay that down as a particular always to be admitted in determining the damages occasioned by a wrongful collision. I regard it, in the present instance, as a reasonable mode of compensating the party for what is a positive loss to him, and as one which avoids the vague and objectionable valuation of the probable earnings of the boat, had she not been so prevented following her usual employment.

We concede that between private litigants interest usually is awarded, but it is awarded as interest and by that name. Note the decrees in the following cases. The first is a recent one from the Second Circuit, relied upon by petitioner. In the other three, as hereinbefore pointed out, Congress expressly authorized the recovery of "damages, including interest, * * * upon the same principle and measure of liability as in like cases in admiralty between private parties."

Texas Co. v. *United States*, 11 F. (2d) 981:

> That the libellant does recover of the respondents, United States of America, the sum of $12,918.74, *with interest thereon at the rate of six per cent* from September 3, 1917, together with costs in the sum of $48.30. [Italics supplied.]

Colonial Navigation Co. v. *United States*, supra:

> That libellant * * * owner of and from respondent * * * the sum of $22,305.83, *the amount of the damages sustained by the libellant with interest thereon as set forth in stipulation herein annexed.* [Italics supplied.]

Brooklyn v. *United States*, supra:

> That * * * the libellant above named, recover herein against * * * the Respondent, $2,367.51, *the amount of damages suffered by libellant* * * * *with legal interest thereon* * * *, amounting to* $2,481.76 * * *. [Italics supplied.]

Mallory Steamship Co. v. *United States*, supra:

> That the libellant * * * owner of and from * * * the respondent herein, the sum of $3,775.41, *the damages as found by the court, together with interest thereon at the rate of six per cent per annum* * * *. [Italics supplied.]

It would appear, therefore, that "damages" and "interest" are distinct terms, well understood in admiralty, no less than at law, and that "damages," without more, does not include interest.

Between private parties, an admiralty court may deny interest because of delay (Benedict on Admiralty, 5th ed., sec. 429); and this keeps the amount of interest within reasonable bounds. The rule would seem impossible of application, however, to cases against the Government under Special Acts, so that interest would sometimes accrue

claiming proportions, as in *Pound* v. *United States*, *supra*, where forty-two years' interest was claimed.

Even in the case at bar, if between private parties, both interest and costs might have been denied because of four years' delay in bringing suit. *The James Dr W Disney*, 230 Fed. 951, 955. But can the usual rule be applied? The statute expressly authorizes costs; and suit could not have been filed before Congress had acted. If "damages" include interest, must the court in each case determine whether the claimant or whether Congress was responsible for delay in enacting the statute, or must it arbitrarily award as "damages" a sum perhaps several times the amount of loss actually sustained at the time of the collision?

It should be remembered that the United States is not always responsible, or solely responsible, for delay. Congress is always being importuned in the matter of private claims, many very old and many without merit. A valid claim may be timely presented, and yet its full equitable amount (as Congress would be amply justified in failing at first to be convinced of its merits).

Certainly an admiralty court, attempting to apply the usual rules, could not be expected to weigh all of this. Congress would seem to be the best and only competent judge, and, as heretofore pointed out, has at times authorized payment of interest when the Government has been clearly at fault, as in the case of *Brandies* v. *United States*,

supra, where some ten years were permitted to elapse before a bill was enacted.

As a further distinction between the present case and those cited by petitioner, it may be pointed out that the award of interest on the principal amount of the damage presupposes the existence of a legal obligation from the time of the injury and the withholding by the defendant of a sum of money which (legally) "ought to have been paid to the claimant, and [the defendant] having therefore been able to receive interest upon it, ought to be held to have received it for the person to whom the principal was payable." Sir Charles Butt in *The Kong Magnus* (1891), Prob. Div. 223, 235. In the case of a claim against the Government, however, until Congress has acted and liability has been established as directed by law, there is no legal obligation existent. *United States* v. *Sherman*, 98 U. S. 565, 567—

> Before that time, the government is under no obligation, and the Secretary of the Treasury is not at liberty to pay. When the obligation arises, it is an obligation to pay the amount recovered; that is, the amount for which judgment has been given. The act of Congress says not a word about interest. Judgments, it is true, are by the law of South Carolina, as well as by Federal legislation, declared to bear interest. Such legislation, however, has no application to the government. And the interest is no part of the amount recovered. It accrues only after the

> recovery has been had. Moreover, whenever interest is allowed either by statute or by common law, except in cases where there has been a contract to pay interest, it is allowed for delay or default of the debtor. But delay or default cannot be attributed to the government. * * *
>
> * * * It cannot be admitted that the plaintiff, at his option, may impose upon the United States a liability to pay interest, as long as he pleases, upon a sum of money that, during all the time in which the interest accrues, the government was not bound to pay.

Seeking to avoid application of the maxim, *expressio unius est exclusio alterius*, petitioner argues (old brief, p. 14), that "damages" does not include costs. Roscoe, Damages in Marine Collisions (2d ed.), pp. 64–65, declares costs to be affected by the same considerations applicable to interest and to be comprehended within the rule of *restitutio in integrum*.

Petitioner inquiries (old brief, p. 14): "Can it be supposed that Congress gave this trifle [costs—expressly authorized] yet withheld what is essential to a just and full reparation?" It is necessary only to refer to Secs. 152 and 177, Jud. Code (U. S. C. Title 28, Secs. 258, 284), one of which expressly authorizes costs to suitors in the Court of Claims and the other expressly forbids allowance of interest—indicative of the general policy.

(b) AUTHORITIES CITED BY PETITIONER (OLD BRIEF) HAVE DEALT WITH PRINCIPLES ALTOGETHER DIFFERENT FROM THOSE HERE APPLICABLE

The Charming Betsy, 2 Cranch 64. Captain Murray of the U. S. Frigate *Constellation* was held personally liable for a tortious seizure as prize of war. Interest was allowed without discussion. The report contains a footnote to the effect that Captain Murray was later reimbursed by Act of Congress.

The Anna Maria, 2 Wheat. 327, 335, and *The Amiable Nancy*, 3 Wheat. 546, 560, concerned liability arising out of tortious seizures by privateers owned by American citizens. There is no discussion respecting allowance of interest, and it does not appear what, if any, interest the United States had in the result—the captures being unlawful.

The Nuestra Senora de Regla, 108 U. S. 92, 104; *The Paquete Habana*, 189 U. S. 453, 467; *The Lubuan*, Blatchford's Prize Cases, 165, and *The Sybil*, *id.* 615, concerned vessels unlawfully seized and libeled in the name of the United States as prizes of war. It would seem that primarily the responsibility was that of the officers who acted without authority of law, as in the case of Captain Murray, *supra*. However, it appears that the United States "voluntarily submitted themselves to the court" and undertook to answer for the officers' wrongs —directly instead of indirectly by subsequent reimbursement. None of them discusses allowance of interest or sheds any light on the question here.

Erskine v. *Van Arsdale*, 15 Wall. 75, was an action against a public officer for money illegally exacted as taxes. The judgment was against the officer personally for a tort committed by him, and the fact that the United States would probably pay the amount of the judgment did not affect the measure of damages. *The Apollon*, 9 Wheat. 362, 377, was a proceeding against a Customs Officer for an unlawful seizure and involved the same principles.

Miller v. *Robertson*, 266 U. S. 243, 257, while recognizing the principle of *Banco Mexicano* v. *Deutsche Bank*, 263 U. S. 591, 603, that a suit against the Alien Property Custodian is, in effect, against the United States, nevertheless allowed interest. The Court carefully pointed out, however, that—

> the claim was not against it [the United States]. No debt was alleged to be owing from it to the plaintiff. The rule of sovereign immunity from liability for interest * * * does not apply.

Standard Oil Company v. *United States*, 267 U. S. 76, 79, allowing interest, is explained by this sentence from the opinion:

> When the United States went into the insurance business, issued policies in familiar form and provided that in case of disagreement it might be sued, it must be assumed to have accepted the ordinary incidents of suits in such business.

United States v. *Rogers*, 255 U. S. 163, 169; *Seaboard Air Line Ry. Co.* v. *United States*, 261 U. S. 299, 306; *Brooks-Scanlon Corp.* v. *United States*, 265 U. S. 106, 123; *Liggett & Myers Tobacco Co.* v. *United States*, 274 U. S. 215, 220; *Phelps* v. *United States*, *id.* 341, 344; and *Compagnie Generale Transatlantique* v. *United States of America* (Hull No. 5) ——Ct. Cls.——(February 14, 1927), 1927 A. M. C. 485, were proceedings to recover the "just compensation" guaranteed by the Constitution for private property taken for public use. They recognize a difference between proceedings to recover "just compensation" (ascertainment of which was said to be a judicial function) and an ordinary demand or claim against the Government.

United States v. *The Thekla*, 266 U. S. 328, 340, 341, followed in *The Barendrecht*, 11 F. (2d) 377, involved cross libels arising out of a collision with a vessel owned by the United States *pro hac vice* and operated through the United States Shipping Board Emergency Fleet Corporation—which the Court declared might be held liable for interest. The petitioner relies upon the general language contained in the latter part of the following sentence—but refrains from quoting the first part, which seems to indicate a distinction between that case and this:

> The reasons that have prevailed against creating a government liability in tort do not apply to a case like this, and on the other hand the reasons are strong for not obstruct-

> ing the application of natural justice against the government by technical formulas when justice can be done without endangering any public interest.

United States v. *McKee*, 91 U. S. 442, 450. A claim for money and supplies furnished troops during the Revolutionary War was referred to the Court of Claims with direction that—

> In making such adjustment and settlement, the said court shall be governed by the rules and regulations heretofore adopted by the United States in the settlement of like cases.

The claim was one of the class provided for by the the Act of August 5, 1790, c. 38, 1 Stat. 178, 179, expressly allowing interest, and would have been brought thereunder except that the period of limitation had run.

CONCLUSION

It is respectfully submitted that the conclusion of the Circuit Court of Appeals is required by the language of this Act, standing alone, when read in the light of accepted canons of construction; is in accord with the evident intent of Congress; and is in harmony with the uniform holdings of the District Courts when construing many private Acts, similarly worded, during a long period of years, acquiesced in and relied upon by Congress when using the same language time after time, often

under circumstances repugnant to any idea that allowance of interest was contemplated.

The decree of the Circuit Court of Appeals should be affirmed.

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OCTOBER, 1928.

APPENDIX A

Unreported Opinion in *Nippon Yusen Kabushiki Kaisha* v. *United States*. (Eastern Dist., N. Y., May 7, 1926.)

CAMPBELL, *D. J.*:

[The opinion covers twenty-one typewritten pages. Only that part printed here deals with the matter of interest.]

But one question remains for further consideration and that is whether, as contended by the libellant, this court, under the special act which conferred jurisdiction upon it to try this case, has power to allow the libellant interest from the date of the collision up to the date of the decree.

If the allowance of interest rests in discretion in the case at bar, the reasons for the exercise of that discretion in libellant's favor are convincing.

The question of the allowance of interest in the case at bar, however, is primarily one of law.

No action could be maintained by the libellant in this court for the recovery of any of the damages alleged in the libel if the United States had not, by the statute cited, *supra*, permitted itself to be sued in this court as provided in that statute.

That statute must be strictly construed and this court can not go beyond the letter of such consent. (*Schillinger* v. *United States*, 155 U. S. 163, 166; *Reid Wrecking Co.* v. *United States*, 202 Fed. 314; *Reid* v. *United States*, 211 U. S. 529; *United States* v. *Dalcour*, 203 U. S. 408, *The Isonomia*, 285 Fed. 515.)

It is a well-settled principle that the United States is not liable to pay interest on claims against it in the absence of expressed statutory provision

to that effect (*Angarica* v. *Bayard*, 127 U. S. 251), in which case Mr. Justice Blatchford, writing for the court, at page 260 said:

> It has been established, as a general rule, in the practice of the government, that interest is not allowed on claims against it, whether such claims originate in contract or in tort, and whether they arise in the ordinary business of administration or under private acts of relief, passed by Congress on special application. The only recognized exceptions are, where the government stipulates to pay interest and where interest is given expressly by an act of Congress, either by the name of interest or by that of damages.

As a further evidence of the existence of such rule, reference may be made to Section 177 of the Judicial Code which controls the action of the Court of Claims, and reads as follows:

> SEC. 177. (*No interest on Claims*).—No interest shall be allowed on any claim up to the time of the rendition of judgment thereon by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest.

It thus appears that Congress must have expressed its intention to allow interest on the libellant's claim up to the time of the rendition of the decree, or interest must be denied.

Interest is not specifically mentioned in the Enabling Act approved February 16, 1925, under which the suit at bar has been brought, but after describing the claim of the libellant, and conferring jurisdiction on this court sitting as a court of admiralty and acting under the rules governing such court, the said act, in part provides as follows:

> And such court shall have jurisdiction to hear and determine such suit and to enter a judgment or decree for the amount of such damage, and costs, if any, as shall be found to be due against the United States in favor of said Nippon Yusen Kabushiki Kaisha, or against the said Nippon Yusen Kabushiki Kaisha, in favor of the United States, upon the same principles and measures of liability as in like cases in admiralty between private parties and with the same rights of appeal.

If the suit at bar was between private parties the libellant would, without doubt, be allowed interest. (*The America*, 1 Fed. cases, 285, reversed on other grounds, 92 U. S. 432. *In re Great Lakes Dredge & Dock Co.*, 250 Fed. 916.)

The United States if it prevailed would be entitled to interest, but does it follow as a logical consequence that the converse of the proposition is true?

Libellant contends that it is, and cites *The Commonwealth*, 297 Fed. 651, 654, and *Texas Co. v. United States of America*, unreported opinion of Judge Goddard, District Court, Southern District of New York, Admiralty 81-332, January 29, 1926.

I am not convinced that by the use of the words upon the same "principles and measures of liability," Congress showed its intention to overrule its general policy on the subject of not allowing interest unless specifically provided.

Earlier in said Act the jurisdiction of this court is limited as follows:

> To hear and determine such suit and to enter a judgment or decree for the amount of such damage, and costs, if any, as shall be found to be due against the United States,

A distinction between damages and interest exists (*The Scotland*, 118 U. S. 507) in which case, at page 518, Mr. Justice Bradley, writing for the court, says:

> The allowance of interest on damages is not an absolute right.

Therefore, by the use of the words "principles and measures of liability," Congress did not show any intent to increase the power which it had conferred on this court "to enter a judgment or decree for the amount of such damage and costs," so as to allow interest on such damages, and however strongly may it appeal to this court that the case at bar is one in which interest might, under ordinary conditions, properly be allowed, it does not seem to me that Congress, by the Enabling Act, *supra*, conferred upon this court power to make an award of interest from the date of the collision to the date of the entry of the decree herein.

I do not think it makes any difference whether or not the United States is claiming interest in the case at bar, as suggested in *Nantasket Beach Steamboat Co.* v. *United States*, 297 Fed. 656, although if the reasoning of that opinion be accepted, it is exactly in point and justifies the denial of such interest in the case at bar; but my decision is based on the ground that this court is concluded by the Enabling Act, *supra*, and that under that Act this court is not empowered to allow such interest.

APPENDIX B

STATUTES CONFERRING UPON THE HEADS OF EXECUTIVE DEPARTMENTS AUTHORITY TO "ADJUST AND DETERMINE THE AMOUNTS DUE" ON SMALL CLAIMS ARISING OUT OF COLLISIONS WITH PUBLIC VESSELS, ETC.

(These statutes are listed in Senate Report No. 941, 68th Congress, second session, January 26,

1925, pages 9, 13, and 15. The report contains a brief history of this class of legislation and an indication of the large number of claims arising.)

June 24, 1910, c. 378, 36 Stat. 605, 607; Secretary of the Navy; collision claims not exceeding $500.

June 25, 1910, c. 382, 36 Stat. 630, 676; Chief of Engineers, on approval of Secretary of War; collision claims, river and harbor works, not exceeding $500.

June 17, 1910, c. 301, 36 Stat. 534, 537; Commissioner of Light-houses, on approval of Secretary of Commerce; collision claims, vessels of the Light-house Service, not exceeding $500.

August 24, 1912, c. 391, 37 Stat. 569, 586; Secretary of War; claims for damages to vessels, wharves, etc., due to military operations, etc., not exceeding $1,000.

April 18, 1918, c. 57, 40 Stat. 532; Any officer designated by the President, under regulations of the Secretary of War; claims for damages caused by American military forces abroad (no limitation of amount).

July 1, 1918, c. 114, 40 Stat. 704, 705; Secretary of the Navy; claims for damages to property of non-enemy persons abroad, during the period of the war, not exceeding $1,000.

June 5, 1920, c. 240, 41 Stat. 948, 965; Auditor for the War Department, upon approval and recommendation of Secretary of War; claims for damage to private property incident to training, practice, operation, etc., of the army; repeated in subsequent Appropriation Acts; limited to $500, by Act of June 30, 1922, c. 253, 42 Stat. 716, 725, which substituted the General Accounting Office for the Auditor for the War Department.

June 5, 1920, c. 256, 41 Stat. 1054: Superintendent of the Coast and Geodetic Survey, on approval of Secretary of Commerce; all claims for damages, not exceeding $500.

December 28, 1922, c. 16, 42 Stat. 1066: Amending Act of June 24, 1910, *supra*, and authorizing Secretary of Navy to adjust collision claims arising since April 6, 1917, not exceeding $3,000.

December 28, 1922, c. 17, 42 Stat. 1066: Authorizing the head of each department and establishment of the Government to adjust claims for damages to private property arising after April 6, 1917, not exceeding $1,000.

Most of the foregoing statutes direct that the claims adjusted shall be reported to Congress through the Treasury Department. The Act of July 7, 1884, c. 334, 23 Stat. 236, 254 (U. S. C. Title 5, Sec. 266) provides that:

> The Secretary of the Treasury shall, at the commencement of each session of Congress, report the amount due each claimant * * * to the Speaker of the House of Representatives and the presiding officer of the Senate, who shall lay the same before their respective houses for consideration.

No interest is allowed on collision claims adjusted under these statutes, as indicated by the records of the various departments and by letters addressed to the Attorney General from the officers, and bearing the dates indicated below.

> Secretary of the Treasury, October 4, 1928.
> Secretary of War, October 4, 1928.
> Secretary of the Navy, October 2, 1928.
> Secretary of Commerce, September 22, 1928.